Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Cross-Ownership of Broadcast Stations and Newspaper	)	MM Docket No. 01-235
Newspaper/Radio Cross-Ownership Waiver Policy	)	MM Docket No. 96-197

REPLY COMMENTS OF CONSUMERS UNION, CONSUMER FEDERATION OF AMERICA, MEDIA ACCESS PROJECT, CENTER FOR DIGITAL DEMOCRACY, AND THE CIVIL RIGHTS FORUM

February 15, 2002

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EXECUTIVE SUMMARY

The fundamental question before the Commission in this proceeding – whether a broadcaster should be allowed to own or be owned by a newspaper in the same community – requires that the Commission maintain a precise focus on what is at stake in reviewing such an important rule. The FCC is obligated by both the U.S. Constitution and the Communications Act to ensure that the main sources of independent news and information in this country will not be undermined by allowing cross-ownership.

The Commission must therefore ensure that any joint ownership of newspaper and television broadcast properties in a community does not inhibit dissemination of news and information from diverse and antagonistic sources. Consumers Union (CU) *et al.* demonstrate clearly in these reply comments with substantial empirical evidence that joint ownership of local newspaper and broadcast television outlets would indeed inhibit dissemination of information from diverse and antagonistic sources, and must be prohibited.

The newspaper and broadcast industry comments in this proceeding fail to articulate a meaningful definition of diversity. They attempt to substitute variety, or an increase in the number of outlets or programs, for the real diversity the Constitution and the Communications Act require: independently-owned, antagonistic media sources. And they lump "entertainment"—programming lacking a substantive message—with news and information, undercutting the entire purpose of the cross-ownership ban. As the Supreme Court has noted, the First Amendment and the Commission's public interest mandate strive to promote the widest possible dissemination of information—not entertainment—from diverse and antagonistic sources.

Our nation's constitutional principles in general, and the First Amendment in particular, do not lend themselves to narrow, concrete benchmarks. Sometimes the Constitution requires the Commission to do more than math. Nonetheless, CU *et al.* contend that even when one merely "does the math," the answer to the question of whether the Commission must preserve the newspaper/broadcast cross-ownership prohibition is unequivocal. This rule must be retained.

In most Designated Market Areas in the country, the number of independently-owned major media outlets – TV stations and daily newspapers – is extremely small. Using standard measures of market structure, we demonstrate that two-thirds of the newspaper markets are monopolies, another quarter are duopolies, and the rest – another sixth – are tight oligopolies. For broadcast television markets, we demonstrate that one-seventh are monopolies, one-quarter are duopolies, one half are tight oligopolies, and the remainder – one-eighth – are moderately-concentrated.

CU *et al.* show that lifting the ban will trigger a wave of mergers that would compound the economic pressures already weakening journalistic quality and antagonism in the media. On a national basis, there are a total of only about 650 independent owners of major media outlets. This is a remarkably small number of owners in a nation of 285 million

people spread over 3,000 counties. Lifting the cross-ownership ban would substantially reduce the number of independently owned media outlets in our nation. Hundreds of newspapers would quickly merge with TV stations and by the time the dust settled, the number of independent owners of major local news media would be slashed by almost one-half.

Furthermore, elimination of the cross-ownership ban would do more harm than merely reducing the number of independent voices. CU *et al.* defend the cross-ownership ban primarily on the basis of the need for institutional diversity and antagonism between the major media. We present case studies which show that cross-ownership—in some respects—turns newspapers from watchdogs into lapdogs, unable to report on or criticize affiliated TV media, particularly when the interests of the cross-owners are most affected. This reduces market incentives for cross-owned broadcast stations to sustain high-quality news and information reporting about the business interests of these companies. Traditional checks and balances disappear under the weight of unified economic interests, and this undermines the behavior and professionalism of reporters. Efficiencies of combinations may promote variety for some time, but they diminish viewpoint diversity and dilute commitments to policing media behavior.

Industry commenters offer anecdotes from markets that they claim are models of perfect cross-ownership behavior. To the contrary, CU *et al.* demonstrate that in these very same markets industry holds up as poster children for cross-ownership, signficant First Amendment goals and public interest obligations have been undercut.

In Quincy, Illinois—the smallest grandfathered cross-ownership media market in the country—the local media monolith is alleged to have acted predatorily to shut out any competition for advertising. It gave all would-be advertisers a choice: advertise with us and only with us, to the exclusion of our competitors, and we will give you huge discounts on advertising. Choose otherwise and we will double your rates. It was only because they have holdings in both newspaper and broadcast that they were able to force this choice on advertisers.

In Tampa, Florida, the owner of a local daily newspaper and television station moved both under the same roof. A "Multi-Media Desk" was created to facilitate editorial cooperation, although the editorial staffs are to remain "independent." Despite this independence, the newspaper's media critic was forced to stop criticizing the television station to avoid creating any ill will among the combined staff and subsequently had his coverage of the station undermined when he was "requested" by managers to drop another story. Oddly enough, the owner claims that "it is Tampa that to date best illustrates the company's approach to convergence."

In Canada, the notion that cross-ownership leads to no journalistic harms has been directly challenged with an astounding example of outright censorship by an owner. A media conglomerate bought 136 papers across Canada and forced its 14 big city papers to run national editorials. No dissent is allowed from the views offered in these editorials and employees have the clear impression that this policy goes far beyond editorial issues;

journalists who attempt to write about this travesty or criticize the family that owns the conglomerate, see their stories get spiked. Five journalists were forced to resign. The news about this set of events, which received substantial local, national, and international coverage, was never covered by the cross-owned entity. Amazingly, today the *Christian Science Monitor* reports that this owner explicitly told all journalists in the media conglomerate that they will be fired for criticizing the company's policies. The clear lesson is that ownership matters most—there can be no real antagonism with common ownership.

Industry commenters contradict their own arguments for why joint ownership creates no problem. They scoff at the dangers of combination, claiming that the distinct cultures of newspapers and broadcast outlets will prevent a loss of antagonism. They then go on to point out and praise the fact that "with common ownership comes a shared vision of how operations should be conducted in ways that will benefit the entire company." Then "antagonism" becomes a bad theory for the industry when it argues that joint ventures are insufficient to achieve desired efficiencies, since in joint ventures: 1) each partner may take actions that do not maximize the profits of the joint venture, and 2) dispute resolution is more burdensome within a joint venture, and can be streamlined by common ownership. "Streamlining" dispute resolution is a thin veil for the ability of a corporate parent to dictate a particular point of view, select "relevant" news, and massage information for the benefit of its cross-owned news entity.

CU *et al.* fully support this conclusion—antagonisms exist between newspaper and TV broadcasters, antagonisms that will disappear when they combine—and this is precisely the point of prohibiting cross-ownership. Separate ownership is essential to journalistic antagonism because there can be no real antagonism within a profit-maximizing, cross-owned structure. Journalists either self censor their behavior or are explicitly censored by management.

Industry commenters paint a picture of a world in which daily and weekly newspapers, broadcast and cable television, the Internet, direct broadcast satellite television, radio, and direct mail advertising are all substitutable products. These services, they claim, are all mechanisms for carrying news, information, and entertainment. But again, these industry commenters confuse variety with real diversity—independently-owned sources.

The underlying subtext to this proceeding is that these media owners see enormous opportunity for profit through governmental intervention. Eliminating this rule will allow them to reap high sales prices for their media properties, prices that will carry the premium of media market domination. With this context, it is clear why industry commenters show no interest in viewing this proceeding within constitutional or broad public policy terms.

The case studies, economic and market analysis CU *et al.* present in these Reply Comments provide a powerful case in defense of the current newspaper/broadcast cross-ownership rules. More importantly, they demonstrate that newspaper and broadcast industry commenters, and others seeking to overturn the rule, have not met their burden of demonstrating why the Commission should modify or repeal the rule. Therefore, we believe the Commission should see through the inadequate, conflated, self-interested analysis offered

by industry and preserve a cross-ownership rule that is essential to a vibrant democratic society.

PART I:

INTRODUCTION AND OVERVIEW

I. THE CROSS OWNERSHIP BAN PROMOTES THE WIDEST POSSIBLE DISSEMINATION OF INFORMATION FROM DIVERSE AND ANTAGONISTIC SOURCES

A. COMMENTERS

Consumers Union, Consumer Federation of America, Center for Digital Democracy, and the Media Access Project (CU et al.) respectfully submit these reply comments.

B. PROMOTING THE PUBLIC INTEREST IN CIVIC DISCOURSE

1. The Public Interest is a Difficult, But Worthy Standard Uniquely Expressing the First Amendment Aspirations of the Communications Act

The fundamental question before the Commission in this proceeding – whether a broadcaster should be allowed to own or be owned by a newspaper in the same community – requires the FCC to exercise its duty to promote the public interest in arguably the most important markets that are essential to the functioning of democracy in our society. It is absolutely critical that the Commission maintain a precise focus on what is at stake when such an important rule is being reviewed—whether or not our nation maintains its firm commitment to preserve the main source of independent media voices in this country.

Because the "public interest" can be interpreted in different ways leads some to shy away from proposing regulation based on such a "vague" standard. And since print and broadcast media markets have been revolutionized with the new technologies of telecommunications leads some to assume that past regulation "must" change since things *seem* different in these markets. Yet print and broadcast media serve as the largest forum for

the open, democratic debate about ideas, and this is the essence of the American model of government. This requires the Commission to apply the highest level of scrutiny to arguments that separation of these important local sources of news and information is no longer necessary.

Some argue that there is no need for limiting ownership because so much newspaper and television content is pure entertainment, reflecting no editorial bias. And some argue that there are so many entertainment channels with variety of viewer options that ownership limits are unnecessary. However, these claims miss the very point for having a newspaper/broadcast cross-ownership prohibition in the first place: According to the Supreme Court, the First Amendment strives to promote the widest possible dissemination of information—not entertainment—from diverse and antagonistic sources.

And the Commission must therefore ensure that, regardless of whether entertainment choices expand, any joint ownership of newspaper and television broadcast properties in a community that would inhibit dissemination of information from diverse and antagonistic sources is prohibited. As Robert McChesney and Mark Miller point out in their attached statement, "for communications policy to be most effective, it requires as much informed public participation as possible." Lewis Friedlander in his attached statement concurs, pointing out the fundamental importance of local sources of news as a trigger of political participation.

> One of the most fundamental principles of the role of news in a democracy is that diverse sources of news are essential to a robust public and civic life. There is little disagreement with this proposition regardless of political orientation or philosophy…
>
> But news sources are not fungible. To discuss diversity, we need to agree on the relevant level of news. News about the city council or local schools or state welfare policy is not interchangeable with national news about economic

> or foreign policy. For sources to be considered both diverse and democratically useful, they must be diverse at the level that citizens themselves could act on them politically should they so choose. The question, then, is not, "are there a multiplicity of outlets of news and information" but "are there a multiplicity of outlets that correspond to the actual levels of governance, decision-making, and problem-solving that citizens need and use?"

2. Focusing the Public Interest Standard on News and Information

Consumers Union, et al., recognize that the standard we urge the Commission to maintain in this proceeding is quite sweeping. But our nation's constitutional principles in general, and the First Amendment in particular, do not lend themselves to narrow, concrete benchmarks. Sometimes the Constitution requires us to do more than math. Nonetheless, we contend that even when you "do the math," the answer to the question of whether the Commission must preserve the newspaper/broadcast cross-ownership prohibition is unequivocal. This rule must be retained. Given the difficult task the Commission faces in preserving broad constitutional precepts, CU *et al*. offer:

- A highly specific scope of content the ownership rule should relate to—local news and information from the primary sources newspapers and television broadcasters;
- A narrow focus on what kind of diversity matters—not variety of information from the same company/owner, but information from independently owned media outlets;
- A rigorous analysis of how citizens rely upon newspapers and television for different qualities of presentation of news and information, which have no meaningful substitutes in other technology/media (i.e., the Internet or radio);
- A precise concept – a system of media checks and balances, fundamental to our structure of government – which explains why democracy requires that in concentrated markets, local newspapers and television broadcasters remain

independent to ensure that they serve as the watchdogs on each other's presentation of news and information;

- An analysis of market structure and ownership patterns illustrating extremely high levels of market power in virtually all local newspaper markets and substantial concentration in most local television markets;
- Detailed examples of how newspapers that have been allowed to enter into cross-ownership relations with broadcast outlets in the same community have abandoned the antagonistic, watchdog function critical to providing the public adequate news and information—including the business practices of media companies themselves;
- An empirical analysis illustrating significant economic advantages these cross-owned entities have over independent broadcasters and newspapers in their markets, enabling cross-owned companies to become the dominant disseminators of news and information, thereby undermining the long-term vibrancy of antagonism and competition in the presentation of news and information; and
- An estimation of how many independent newspaper and broadcast voices would be lost – cut almost in half (when measured at the national level) and by more than one quarter (when measured on a market-by-market basis) – if the FCC eliminates the cross-ownership rule and print/media companies are allowed to act upon their clear incentives to merge.

In other words, CU *et al*. provide the Commission with a precise, replicable, analytically driven, empirically supported foundation for applying a sweeping First Amendment concept to a very specific public interest finding that the newspaper/broadcast cross-ownership rule should be preserved.

C. THE MATH OF MEDIA MARKETS DEMONSTRATES THAT THE RULE SERVES THE PUBLIC INTEREST

The initial comments of Consumers Union, et al. outlined broad public policy reasons grounded in the Communications Act for retaining the rule on separate ownership of local newspaper and broadcast television stations. The attached statement of Henry Geller, who helped craft the original rule as former General Counsel for the Commission, presents a brief restatement of the legal principles. He reminds the Commission that the broad charge to promote the "widest possible dissemination of information from diverse and antagonistic sources" lies at the core of the Commission's obligation to promote the public interest under the Communications Act. Geller also challenges the Commission to "do the math" with respect to media markets. That is precisely what Consumer Union, et al., did in our initial comments, and we offer much greater detail in these replies. We presented theoretical and quantitative analyses of structural conditions in the industry supporting the conclusion that the elimination of the cross ownership ban would erode public interest goals of enhancing civic discourse and promoting antagonistic relationships among major sources of news and information.

In these reply comments, we expand our initial analysis of the four negative effects that would result from the elimination of the cross-ownership ban:

- Growth in market concentration and in barriers to entry resulting from broadcast-newspaper mergers, which combine features of vertical and conglomerate mergers.
- Loss of independent local media voices.
- Weakening of the watchdog function provided by institutional diversity in local media.
- Erosion of journalistic values resulting from both conglomeration and merger-related demands on resources.

1. **Quantitative Studies of Market Structure Indicate Lifting the Ban Would Create Highly-Concentrated Local Markets for News and Information Dissemination**

In Part II we begin with much more detailed analysis of individual newspaper/broadcast markets. This analysis focuses on broadcast TV and newspapers as the primary sources of news and information.

In most DMAs in the country, the number of independently owned major media outlets – TV stations and daily newspapers – is extremely small. Using standard measures of market structure we demonstrate that:

- Three-fifths of the newspaper markets are monopolies
- another one-fifth are duopolies, and
- the rest – another one-fifth – are tight oligopolies.
- For broadcast television markets, we demonstrate that:
- one-seventh are monopolies,
- one-quarter are duopolies,
- one half are tight oligopolies, and
- the remainder – one-eighth – are moderately-concentrated.

On a national basis, there are a total of only about 650 independent owners of major media outlets. This is a remarkably small number of owners in a nation of 285 million people spread over 3,000 counties. Lifting the cross ownership ban would substantially reduce the number of independently owned media outlets in our nation. Hundreds of newspapers would quickly merge with TV stations. The number of major media owners on a national basis would quickly decline below 500 and few newspapers would be standing alone when the dust settled. The number of independent owners of major media would likely fall to below 400.

As discussed in our initial comments, these national numbers are relevant because they establish the likely pool from which competitors might be drawn and the barriers to competition that new entrants are likely to face. Dramatic increases in concentration and reductions in the number of potential competitors raise significant concerns. The substantial barrier to entry that the growth of large media conglomerates raises is a separate and reinforcing constraint on competition.

Even if we ignore the ownership of newspaper chains and multiple stations across the country and treat each local station/newspaper as a separate "voice," the elimination of the cross-ownership ban would dramatically reduce the number of independent major local media voices, from about 2000 to about 1600. Given the dominant role that TV and newspapers play in the dissemination of information from antagonistic diversely owned sources and civic discourse, this result would be inconsistent with the Commission's mandate to promote the public interest.

2. Qualitative Studies of the Behavior of Combinations Indicate Lifting the Ban Would Undermine the Quality and Antagonism of Information from Major Local Media Sources

Elimination of the cross-ownership ban would do more harm than merely dramatically reduce the number of voices. We defend the cross ownership ban primarily on the basis of the need for institutional diversity and antagonism between the major media. With the assistance of Dean Alger, Part III of these reply comments demonstrates that lifting the ban would also undermine the quality of the voices. It would substantially reduce the fundamental antagonism between the major media. Part III presents qualitative examples and summaries of studies demonstrating that behavioral concerns identified in the original comments have a firm basis in reality.

Stephen Kimber, Associate Professor and Director of the School of Journalism at the University of King's College in Halifax, Canada, and a practicing journalist, who has recently challenged the heavy hand of censorship by a conglomerate media owner, provides a real world example of the threat to journalistic values in his attached statement. His experience and conclusion provides a stern warning for American policymakers:

> Largely because of our recent experiences with the deleterious impact of increasing media concentration and cross ownership, many Canadians are beginning to ask whether we need regulations in this country to prevent companies from owning competing media in the same community. It would be ironic and unfortunate if the FCC chose this moment to abandon a rule that has helped to encourage the public and broadcast of a variety of diverse and competing views on local issues in American cities.[1]

The negative effects of concentration and cross-ownership cross national boundaries, as the half-dozen American case studies presented in Part II demonstrate. There is a pervasive problem in three areas.

- In some instances, cross-ownership turns newspapers from watchdogs into lapdogs, unable to report on or criticize affiliated TV media, particularly when the interests of the cross-owners are most affected. This reduces market incentives for cross-owned broadcast stations to sustain high-quality news and information reporting about the business of interests of these companies.

- Traditional checks and balances disappear under the weight of unified economic interests, and this undermines the competitive behavior and professionalism of reporters. Efficiencies of combinations may promote variety for some time, but they diminish viewpoint diversity and dilute commitments to policing media behavior.

- Lifting the ban will trigger a wave of mergers that would compound the economic pressures that are already weakening journalistic quality and antagonism in the media.[2]

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[1] See Statement of Stephen Kimber, appended hereto, p. 6.

[2] The analogy to antitrust is instructive, but not complete. Antitrust authorities prevent mergers before the fact on the reasonable expectation that the merger will establish a structural condition that is prone to the exercise of market power. The cross-ownership ban is just such a policy, with three fundamental differences. First, merger policy is reactive. The public interest obligation of the Commission is instead proactive. The Commission's charge is to promote the "widest possible dissemination of information from diverse and antagonistic sources."

Second, the "commodity" the Commission is charged with protecting – civic discourse – is the lifeblood of democracy and is far more valuable than mere money.

Our examination of examples of the behaviors of the grand fathered cross-owned media is fundamentally different from the purely anecdotal information provided by industry commenters. Their examples are unaccompanied by any analysis of market structure. The industry presents self-serving claims of philanthropy and performance of civic duties in cases where ownership interests are not at stake, with information that is totally under the control of the commenters. As McChesney and Miller point out, "the claims of the media giants should be taken with a giant grain of salt."

In contrast, our examples are drawn from publicly available, third party accounts of incidents that are illustrative of a systematic pattern of behavior predicted by our structural analysis. Market structure analysis provides the skeleton that gives form to the flesh and blood of misconduct and poor journalistic performance.

II. INDUSTRY COMMENTS MISINTERPRET THE PURPOSE OF THE RULE

A. CAPTURING SYNERGIES AT THE EXPENSE OF DIVERSITY AND ANTAGONISM

Newspaper and broadcast industry commenters argue that the newspaper/broadcast cross-ownership prohibition is an anachronism, based on the realities of a media world that, thanks to technological developments, no longer exists.[3] They paint a picture of a world in which daily and weekly newspapers, broadcast and cable television, the Internet, direct broadcast satellite television, radio, and direct mail advertising[4] are all substitutable

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Third, the Commission knows with great certainty that the mergers that would result under the elimination of the ban would reduce the number of major independent voices

[3] "Given both the increase in local outlet diversity and competition as well as the shift to alternative forms of local media that are qualitatively different than those existing in 1975 . . . it is clear that there is no longer any rational basis on which the newspaper/broadcast cross-ownership restriction can be sustained." Comments of Hearst-Argyle Television, Inc. at 5.

[4] See Comments of Newspaper Association of America (NAA) at iv.

products.[5] These services, they claim, are all mechanisms for carrying news, information, and entertainment.[6] Indeed, one commenter even goes so far as to suggest that consumers now have *too much choice*.[7] They see no differentiation between these services, and offer no distinction between news and entertainment.

These commenters argue that elimination of the rule will provide benefits because of the "synergies" that combined operations bring, both in terms of newsgathering – allowing combined operations to pursue a greater number of news stories in different ways with an increasing number of perspectives[8] – and in advertising – allowing the combined entities to put package deals together for potential clients and adding volume to retail advertising.[9]

The underlying subtext to this proceeding, however, is that these media owners see enormous opportunity for profit from governmental intervention. Eliminating the cross-ownership rule will allow them to reap high sales prices for their media properties, prices that will carry the premium of media market domination.

In this context, it is clear why industry commenters show no interest in having the Commission apply fundamental constitutional principles and careful public policy analysis to its review of the cross-ownership rule.[10]

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[5] See, for instance, Comments of Belo Corp. at 8: "[A] wide range of media outlets now offer comprehensive news and informational coverage—including multichannel video programming distributors and the Internet, in addition to a multiplicity of more traditional broadcast and print options."
[6] See NAA at iv.
[7] See Comments of Freedom of Expression Foundation, Inc. at 16-17: "[A]ll new and competing technologies since the adoption of the NBCO rules in 1975 – has placed the information consumer in a position of having too many, not too few, choices to obtain information and other programming. . . . [T]he consumer in today's media marketplace is overwhelmed by the diversity of choices in both substance and viewpoint now available."
[8] See Belo at 4.
[9] See Comments of The New York Times Company at 19.
[10] See, for instance, Comments of Media General, Inc. at 35.

Arguments to support repeal of the rule are cast in terms to fit inconsistent economic messages. When it is helpful to lump all the relevant media formats together to demonstrate a wide variety of "voices" and "diversity" industry commenters do so.

Yet when it is convenient to separate these media, industry commenters conclude that each media is different in fundamental ways. They claim that newspapers and broadcast outlets have different cultures, different styles of investigation, and therefore the "efficiencies" to be gained by combination will not cause a loss of antagonism.[11] Indeed, they consistently argue that editorial staffs are kept separate and that combined operations do not share a common editorial policy.[12] Even when they acknowledge that there may be potential problems resulting from a lack of editorial separation between entities, industry commenters suggest that these different ethics will produce a kind of policing function between the two.[13]

Despite this "independence" that each piece of a combined entity will supposedly have, industry commenters conclude that when they come together they will have one unified purpose. They admit that "with common ownership comes a shared vision of how operations should be conducted in ways that will benefit the entire company."[14] The reason they claim that joint ventures are not sufficient to meet their needs is that there are certain antagonisms between the services,[15] antagonisms that somehow will not exist when one formally combines different entities with different cultures.

Thus, industry commenters shift between arguing that all media are functional equivalents, which justifies lumping all these services together as substitutes with no

[11] Comments of Gannett Company Inc. at 12.
[12] See Media General at 34-35.
[13] See Gannett at 12.
[14] Gannett at 18. See also Comments of Tribune Company at 55: "Tribune's strategic commitment to multimedia results in quality journalism enhanced by multiple outlets. In markets where it owns both a television station and newspaper, Tribune has *the highest incentives to reconcile conflicting reporting priorities*, resource demands and deadline pressures of its print and television newsrooms." (Emphasis added.)

distinction between news and entertainment, and that cultural differences maintain a diversity of voices even within a combined structure. To arrive at the conclusion that the rule should be eliminated, industry commenters do not explain exactly how these services compete against one another, because they cannot. They never mention who owns the various outlets they cite as competitive alternatives, because such an inquiry would reveal a narrow pool of owners and a narrow pool of viewpoints.

The expert testimony[16] offered by Gannett regarding the efficiencies that cannot be achieved through joint venture is instructive as to the problems presented by cross-ownership. Besen and O'Brien note in their study for Gannett that in joint ventures 1) each partner may take actions that do not maximize the profits of the joint venture, and 2) dispute resolution is problematic within a joint venture and can be streamlined by common ownership.[17]

"Streamlining" dispute resolution—while in some cases may be totally benign, such as ironing out a conflict over an administrative matter—is also a thin veil for the ability of a corporate parent to dictate a particular point of view, select relevant news to cover and massage how information is presented for its cross-owned news entities.

Furthermore, Besen and O'Brien's point about profit maximization could not more directly cut at the heart of the matter. When entities are cross-owned, they share the same bottom line. What hurts one hurts the other.

These incentives are precisely the point of the cross-ownership ban. Once entities come under common ownership, the economic forces that come into play are obvious, like water running downhill. It is when the water is supposedly running uphill that the

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[15] See Tribune at 52-56.

[16] See Gannett, Exhibit C. Stanley M. Besen and Daniel P. O'Brien, "An Economic Analysis of the Efficiency Benefits from Newspaper-Broadcast Cross Ownership." Prepared for Gannett Co., Charles River Associates, Inc. (1998).

Commission should be wary; relying upon "policies" to maintain strict editorial separation and control of cross-owned publications and broadcast stations is not sound public policy. It may well be that the majority of the time, editors have no reason to intervene in the day-to-day affairs of these news entities. However, it is difficult to imagine that if a story by a newspaper reporter implicated misbehavior by a cross-owned broadcaster, there would not be some ability for the broadcaster to exert pressure on the paper and vice versa.

B. THE PURPOSE OF THE RULE IS DIVERSE AND ANTAGONISTIC NEWS AND INFORMATION AND OWNERSHIP, WHICH IS THE BEST PROXY FOR ANTAGONISM.

Justice Black's opinion in Associated Press v. United States should guide the Commission in the review of this rule. "[The First] Amendment rests on the assumption that the widest possible dissemination of information from *diverse and antagonistic sources* is essential to the welfare of the public…"[18] Friedland underscores in his statement a point we made in our initial comments – the perception of the Justices that diversity is central to democracy is borne out by the observable relationship between vibrant civic discourse and participation in the political process.

> My research on civic innovation has investigated the relationship between citizens' knowledge and action and newspaper overage of civic and public issues in eight cities over six years. I found that newspapers that practiced public or civic journalism, characterized in part by greater investment in local newsgathering and coverage, were more likely to have stimulated a wide range of local civic and political participation across many different areas. The greater range of voices in the local media had a significant effect on local democratic life. My colleague David Kurpius of Louisiana State University has recently compared source diversity in television stations practicing civic journalism to non-civic stations and found that source diversity was substantially higher in the civic stations for women, minorities and sources unaffiliated with government. The Project for Excellence in Journalism studies have consistently shown (over four years) that citizens understand the dilution of local news coverage and do not like it. They want more local

[17] *Id*. at 13-21.
[18] Associated Press v. U.S., 326 U.S. 1 (1945) (emphasis added).

enterprise, more and better sources, longer stories, and even more journalists hired to improve local reporting.

Most comments in this proceeding lack a distinction between diversity of content and diversity of sources. Industry commenters betray a misunderstanding of the purpose of the rule when they criticize the Commission for observing that "licensing newspaper owners to operate broadcasting stations 'is not going to add to already existing choices, is not going to enhance diversity.'"[19] They claim that "this reasoning plainly reflects the agency's unproven assumption that greater diversity in ownership will translate, automatically, into greater diversity in programming content."[20]

The Commission's rule is predicated on the fact that more owners equal more antagonism, more diversity. Hundreds of channels of content from the same owner—albeit niche targeted content—do not add up to the diversity of viewpoint provided by separate industry players.

Most importantly, rules such as the newspaper-broadcast cross-ownership limit are designed to protect the public at the moment where antagonism is most challenging. It may not be the bulk of news stories that would present problems for cross-ownership, but rather the stories at the margin of news and information that may appear too controversial to the "majority" audience, but that are the lifeblood of challenging conventional wisdom. Or, it may be the stories that cut to the heart of the ownership interests that are passed over.

FCC Chairman Michael Powell has expressed skepticism that there is a viewpoint expressed in most television programming, and accordingly, skepticism as to whether ownership limits serve any public benefit. As the Chairman stated in USA Today earlier this

[19] Comments of Gannett Co., Inc. at 22, citing *Time Warner Entertainment v. FCC,* 240 F.3d 1126 (D.C. Cir. 2001) at 1133.
[20] *Id*. at 22.

month, "[t]his is some sort of *Citizen Kane* idea that our thoughts will be directed to particular viewpoints. But the overwhelming amount of programming we watch is entertainment, and I don't know what it means for the owner to have a political bias. When I'm watching *Temptation Island*, do I see little hallmarks of Rupert Murdoch?"[21]

First, the decision of what is entertaining and what values are promoted in society is clearly part of the marketplace of ideas. Underlying that show is the premise that paying people money to put their relationships in jeopardy under a voyeuristic lens constitutes good programming. It is highly unlikely that such a view would come from programming on the Pax network. The entertainment shows that we watch send all sorts of messages about important societal issues—such as race, religion and sexuality—even in a sitcom. Second, and most importantly, what gets seen and not seen is quite clearly reflected in Rupert Murdoch's values, such as his decision not to include CNN and the BBC on his cable offerings in China, because they offer unflattering portraits of the Chinese government's stand on human rights issues, as Murdoch understood that his ability to continue broadcasting in China was at stake.[22]

Nonetheless, the primary purpose of the cross-ownership rule should be to ensure a diverse, antagonistic marketplace for news and information—not entertainment. CU *et al.* believe that to focus on entertainment is not only inappropriate in this proceeding, it is inconsistent with the First Amendment foundation for the cross-ownership ban. The goal is not to regulate entertainment, but rather to set appropriate rules to promote diversity of news and information. If the structural rule necessary to protect robust public debate in the media

[21] Davidson, Paul, *"FCC Could Alter Rules Affecting TV, Telephone, Airwaves,"* USA Today, Feb. 6, 2002.
[22] Frank Ching, "Misreading Hong Kong," *Foreign Affairs*, May, 1997.

affects entertainment, so be it. However, there is no need, and indeed should be no desire, to devise a rule designed to affect entertainment.

PART II:

QUANTITATIVE STUDIES OF NEWSPAPER AND TV OWNERSHIP

III. CONCENTRATION OF MEDIA MARKETS

A. TV AND NEWSPAPERS ARE DISTINCT PRODUCT MARKETS

In our initial comments, CU *et al.* provided a broad overview of the market structure of the major mass media. We identified structural characteristics of media markets that make them unlikely to support vigorous competition.

Turning to the economic analysis of these media market, we identified clearly distinct markets for the two dominant forms of mass media, broadcast TV and newspapers. Of utmost importance, people utilize these media in dramatically different ways. TV is primarily an entertainment medium, with its information function focused on relatively short coverage of a broad range of topics. Newspapers, on the other hand, are primarily information-driven, featuring greater depth of analysis. The newspaper medium has a rich historical and professional institutional basis in our culture and plays an important role in the political structure of our democracy.

The economic models for these two media are also somewhat different, particularly when the nature of advertising revenue is taken into account. Broadcast TV is entirely advertiser-supported, particularly in the national market. Newspapers are largely, but not entirely, advertiser supported, with local and classified ads predominating; subscription fees are also a source of revenue. Even where TV advertising is local, it provides a different function from newspaper advertising. TV advertising serves primarily an announcement

function; newspaper advertising provides much more detailed information. Thus, newspapers and TV are as likely to be complementary as competing local advertising media.

Moreover, the advertising market should not be the central concern of ownership policy; civic discourse and diversity of ownership should remain the Commission's focus. The ability of an entity to exercise market power in the advertising market should concern the Commission in this proceeding only if the abuse of that market power threatens to reduce the dissemination of information from diverse and antagonistic voices.

This focus on civic discourse leads CU *et al.* to focus on newspapers and television because radio broadcasting has ceased to be a major voice in civic discourse. It is a minor source of news. Radio stations have relatively small reporting staffs. Friedland points out the unique role of newspapers in providing local news.

> The two primary sources of local news are newspapers and television. Of the two, newspapers provide substantially more local news every day than television stations. The local "news hole," the total amount of news, of even a moderately sized local newspaper is many times greater than the combined daily output of all television stations in the local news market. Further, most local television stations still rely heavily on the local newspaper to set the daily news agenda.

This is not to say that concentration within the radio market is of little concern. In fact, the enormous concentration that has occurred in the radio industry demonstrates the speed with which media markets can become concentrated when limits are relaxed, as McChesney and Miller point out in their attached statement. Friedland notes the devastating impact of increased concentration in radio markets on local news production.

> What about radio? The results of concentration are even more devastating. Radio has steadily declined as a source of local news with the rise of concentrated group ownership. That the amount of local commercial radio news has declined in inverse proportion to the rise in group ownership is indisputable. No serious argument could be mounted that the rise of group ownership has had a salutary effect on the quantity of local news (much less its

> quality). One example from Madison, Wisconsin should suffice. There are three owners of its thirteen radio stations. Nine are owned by either Clear Channel or Entercom and are satellite programmed. Only the remaining four stations continue to provide any significant locally originated news and even this has declined.

Moreover, as pointed out in our initial comments, the decision to cease imposing a public interest programming requirement has led to a dramatic reduction in news production by radio stations. Radio demonstrates that structural limits and public interest obligations do have their intended effect. Freidland points out that this process has afflicted the broadcast TV industry as well.

The CU *et al.* analysis focuses on broadcast TV and newspapers. Cable and satellite will be considered at the end of the analysis because they play, at best, a very small role in local civic discourse. We have demonstrated in our initial comments that neither cable nor satellite provides unique news and information programming that makes a significant contribution to civic discourse at the local level. Their primary role in local civic discourse is to retransmit broadcast stations, a role which is fully reflected in our analysis in the definition of geographic markets.

B. GEOGRAPHIC MARKETS ARE SMALLER THAN THE DMA

Once it is clear that the TV and newspaper markets are distinct major media markets, the Commission must confront a severe problem of concentration within each product and geographic market. Most discussions of TV and newspaper markets use the DMA as the geographic market area. This is a very large market area and any analysis based upon it will seriously underestimate the level of actual concentration for a number of reasons.

First, on the TV side, use of the DMA overestimates the availability of broadcast stations for many viewers. To the extent that viewers receive their broadcast signals through

multichannel (cable or satellite) distribution, this large market may be appropriate. However, a substantial part of the population receives broadcast signals over the air – about 15 percent. For this group, the DMA is far too large a market definition, since signals do not cover the entire DMA.

Second, many smaller broadcast stations do not enjoy distribution throughout the DMA. While they have a right to request carriage throughout the DMA, it makes little economic sense for them to do so. The local news or advertising from communities that are 50 or a hundred miles away from the dominant central city cannot attract enough attention to make it economically worthwhile, nor should it be expected to. Meeting local needs for information dissemination is an important function that Commission policy should promote. Basing public policy on the fiction that every TV station is available to every viewer throughout the DMA distorts the reality of the level of concentration in TV markets.

The problem on the newspaper side is even more severe. Newspapers do not have must carry or retransmission rights throughout the DMA. As pointed out in our initial comments, newspapers are very geographically focused. They are usually identified with a major central city or county where they achieve dominant circulation. When more than one major city or county falls within a DMA the perception of the level of concentration is distorted. We will discuss the impact of geographic markets within DMAs for newspapers after we introduce the measures of market concentration in the next section.

C. DEFINING LEVELS OF CONCENTRATION

In our initial comments, we referred to the U.S. Department of Justice (DOJ) merger guidelines. We repeat that discussion here and present precise definitions of markets.

DOJ defines market levels of concentration to determine the extent of review of mergers;[23] it is unlikely to challenge mergers between companies in unconcentrated markets. To make this assessment, it utilizes the Hirshman-Herfindahl index (HHI), a measure of market concentration.[24] Another way to quantify market concentration is to calculate the market share of the largest 4 firms (4 firm concentration ratio or CR4).

Under Merger Guidelines issued early in Ronald Reagan's first term, DOJ considers a market with an HHI of 1000 or less to be unconcentrated. Such a market would have the equivalent of ten equal sized competitors. In such a market, the 4-firm concentration ratio would be 40 percent (see Exhibit III-1). Any market with a concentration above this level was deemed to be a source of concern, and increases in concentration through mergers would receive scrutiny.

---

[23] U.S. Department of Justice, *Merger Guidelines,* revised 1997.

[24] Shepherd, William, G., *The Economics of Industrial Organization* (Prentice Hall, Engelwood Cliffs, N.J., 1997, Fourth edition), p. 389, gives the following formulas for the Herfindahl-Hirschman Index (HHI) and the Concentration Ratio (CR):

$$H = \sum_{i=1}^{n} S_i^2$$

$$CR = \sum_{i=1}^{m} S_i$$

m i = 1

where

n = the number of firms

m= the market share of the largest firms (4 for the 4 firm concentration ratio)

S_i = the share of the ith firm.

EXHIBIT III-1:

DESCRIBING MARKET CONCENTRATION FOR PURPOSES OF PUBLIC POLICY

DEPARTMENT OF JUSTICE MERGER GUIDELINES	TYPE OF MARKET	EQUIVALENTS IN TERMS OF EQUAL SIZED FIRMS	HHI	4-FIRM SHARE
	Monopoly	1 Firm with 65% or more	4200<	100
	Duopoly	2	5000<	100
↑		5	2000	80
HIGHLY CONCENTRATED	Tight Oligopoly		1800 OR MORE	
		6	1667	67
UNCONCENTRATED	Loose Oligopoly	10	1000	40
↓				
	Atomistic Competition	50 200	8	

Sources: U.S. Department of Justice, *Horizontal Merger* Guidelines, revised April 8, 1997, for a discussion of the HHI thresholds; Shepherd, William, G., *The Economics of Industrial Organization* (Prentice Hall, Englewood Cliffs, N.J., 1985), for a discussion of 4 firm concentration ratios.

DOJ considers an HHI of 1800 as the point at which a market is highly concentrated. This level falls between five and six equal-sized competitors. A market with six equal-sized competitors would have an HHI of 1667. In such a market, the four firm concentration ratio would be 67. A market with five equal sized competitors would have an HHI of 2000. The four firm concentration ratio would be 80 percent.

Shepherd similarly describes these thresholds in terms of four-firm concentration ratios as follows:[25]

> Tight Oligopoly: The leading four firms combined have 60-100 percent of the market; collusion among them is relatively easy.
>
> Loose Oligopoly: The leading four firms, combined, have 40 percent or less of the market; collusion among them to fix prices is virtually impossible.

Shepherd refers to collusion, but that is not the only concern of market power analysis or the Merger Guidelines. These Merger Guidelines recognize that market power can be exercised with coordinated activities, parallel activities, and/or unilateral actions. Based on this discussion, we refer to markets as follows according to the measure used.

TYPE OF MARKET	VOICE COUNT	HHI
MONOPOLY	1	OVER 5,300
DUOPOLY	2	3,000 TO 5,299
TIGHT OLIGOPOLY	3-5	1,800 TO 2,999
CONCENTRATED		
MODERATELY	6-9	1,000 TO 1,799
CONCENTRATED		
UNCONCENTRATED	10 OR MORE	LT 1,000

While these HHI cutting points are "arbitrary," an examination of the data indicates the labels are generally correct. For example, at the low side of the duopoly, we observe the two leading firms with market shares of 40 and 30 percent respectively (with a few much

smaller firms). At the high end of the duopoly range, we observe the two leading firms with market shares of 60 percent and 40 percent respectively. For monopolies, as defined by an HHI of 5300 or more, the leading firm typically has a market share of at least 70 percent.

D. TV AND NEWSPAPER MARKETS

In spite of the fact that the use of the DMA as the geographic market leads to an underestimation of the level of concentration, we still find that these markets are highly concentrated.

Even using the simple voice count methodology advocated by industry commenters, one-third of all TV markets are highly concentrated, tight oligopolies, duopolies, or monopolies. Over 40 percent are moderately concentrated.

Using HHIs, a much more appropriate indicator of market concentration, these markets are even more highly concentrated (see Exhibit III-2). None of the markets is unconcentrated, and only 8 percent are moderately concentrated. Over half the markets are tight oligopolies. A quarter of the markets are duopolies.

Newspaper markets are even more highly concentrated, as summarized in Exhibit III-3. We have gathered data on 68 large markets (average DMA ranking is 56) to calculate HHIs and analyze the advertising revenues in markets that are comparable to those with newspaper/broadcast TV cross-ownership (23 markets with an average DMA rank of 54).

For theses large markets, voice counts show that 58 percent are highly concentrated; 28 percent are duopolies; and 11 percent are monopolies.

---

[25] *Id*., p. 4.

EXHIBIT III-2

CONCENTRATION IN BROADCAST TELEVISION MARKETS:
VIEWER SHARE WITHIN DESIGNATED MARKET AREAS

TYPE OF MARKET	Number of Markets	% of Markets
MONOPOLY	26	12
DUOPOLY	56	27
TIGHT OLIGOPOLY	112	53
MODERATELY CONCENTRATED	16	8
UNCONCENTRATED	0	0
TOTAL	210	100

EXHIBIT III-3

CONCENTRATION IN NEWSPAPER MARKETS:
CIRCULATION OF DAILIES WITHIN 68 LARGE DMAS

TYPE OF MARKET	Number of Markets	% of Markets
MONOPOLY	39	57
DUOPOLY	12	18
TIGHT OLIGOPOLY	12	18
MODERATELY CONCENTRATED	0	0
UNCONCENTRATED	0	0
TOTAL	68	100

These markets are even more concentrated when using HHIs to measure concentration. Well over half of the markets are monopolies (57 percent). One-fifth are duopolies and the final one fifth are tight oligopolies.

For the smaller markets, where we only have voice counts, we find very high levels of concentration. By voice count alone, almost 40 percent are monopolies, a percentage that is four times as large as the voice count percentage for larger markets. Another 40 percent are duopolies, by voice count, a percentage that is much larger than the voice count percentage for larger markets. Thus, we believe that well over two-thirds of newspaper markets are monopolies, with another quarter being duopolies, and the final one tenth are tight oligopolies.

The above DMA-based analysis substantially underestimates the concentration in newspaper markets. We noted that newspapers tend to be very place-specific, providing local news and advertising. They therefore tend to dominate specific areas. To demonstrate this fact, we have examined the newspaper circulation within counties in a number of large DMAs (see Exhibit III-4). These DMAs tend to be well below the national average of concentration. However, when we consider circulation in counties, we find that the markets are much more concentrated. In fact, the weighted HHI is on average almost 2000 points higher at the county level.

Exhibit III-5 shows the detailed analysis for Los Angeles. This is one of the largest DMAs in the country with many newspapers. Our newspaper data cover about 95 percent of the households. Each individual newspaper dominates a specific country. This is not a "failure" of competition in the traditional sense; it reflects the nature of the local newspaper business, where a geographic focus is required. Neither local news nor local advertising for

EXHIBIT III-4

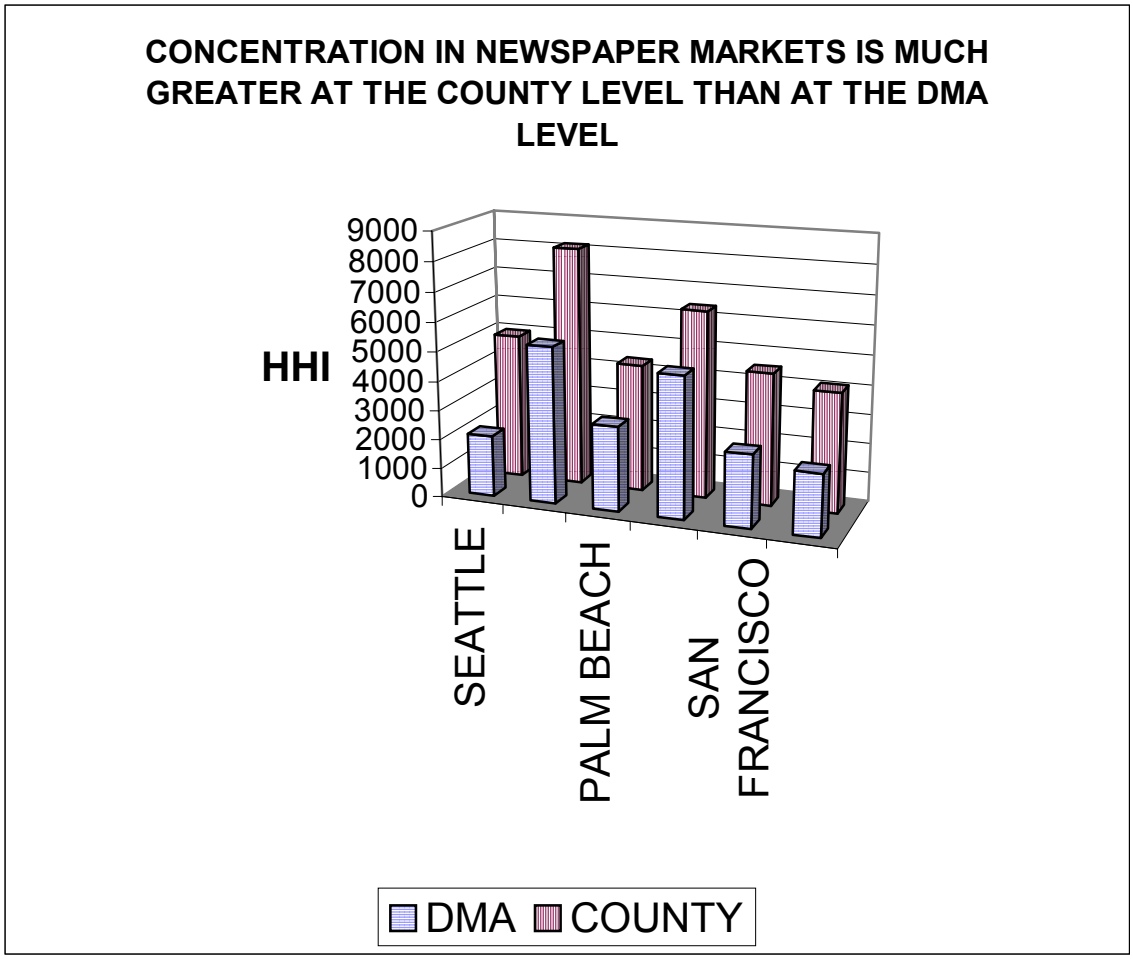
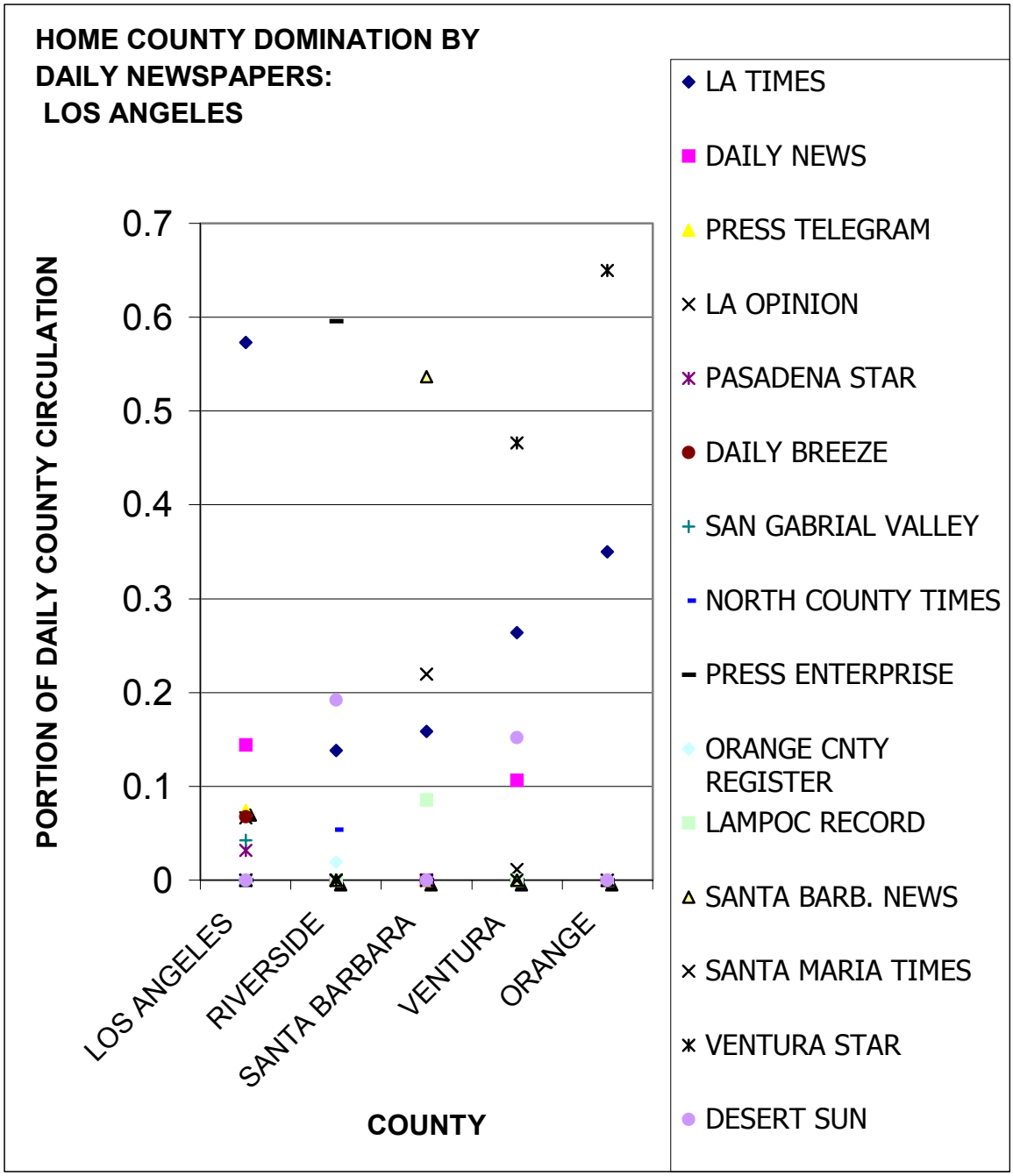


EXHIBIT III-5



large DMAs can be covered in one newspaper, so each paper is significantly specialized in a geographic market.

IV. LIFTING THE CROSS-OWNERSHIP BAN WILL CAUSE A DRAMATIC LOSS OF MAJOR INDEPENDENT LOCAL MEDIA VOICES

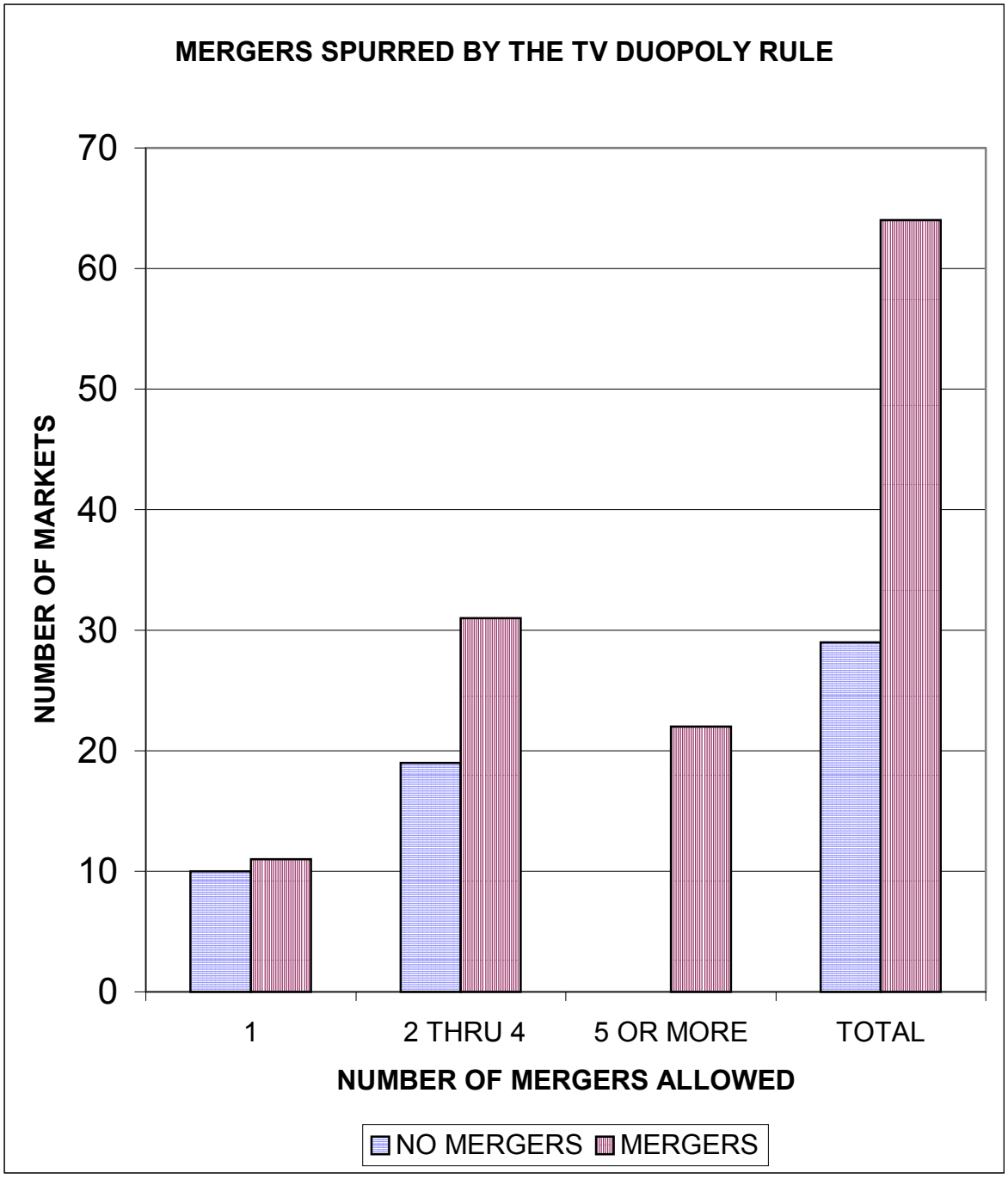
A. REMOVING THE BAN WILL TRIGGER A MERGER WAVE

Starting from this initial base of highly concentrated markets, lifting the cross-ownership ban would have a devastating impact on media concentration. Based on changes in other ownership rules, it is reasonable to expect that several hundred mergers would quickly take place, dramatically reducing the number of major independent voices in these markets.

To gauge the impact of lifting the ban, we examined the rate at which mergers took place in TV markets after the introduction of the duopoly rule in September 1999. The duopoly rule allows a station owner to own two stations within one market as long as there remain eight independent TV voices after such a merger. We estimate that mergers have become permissible in approximately 70 markets since this rule was enacted (see Exhibit IV-1), and that mergers have taken place in about 50 of these markets. In other words, mergers took place in over 70 percent of the markets in which they were permitted. In markets where multiple mergers are permitted, about 36 percent of all the possible mergers have taken place.

Using this as a basis for predicting mergers, we would expect about 200 newspapers to quickly merge with TV stations if the newspaper/broadcast cross-ownership ban is lifted. Ultimately, it is likely that most dailies would be combined with TV stations. As noted in the introduction, there are about 360 independent owners of broadcast TV stations nationwide and about 290 independent owners of daily newspapers. Thus, the total of 650 owners would

EXHIBIT IV-1:


MERGERS SPURRED BY THE TV DUOPOLY RULE
NUMBER OF MARKETS
70
60
50
40
30
20
10
0
1
2 THRU 4
5 OR MORE
TOTAL
NUMBER OF MERGERS ALLOWED
NO MERGERS
MERGERS

decline to well below 500 very rapidly. In the long term, it is likely that most newspapers would be cross-owned with TV stations.

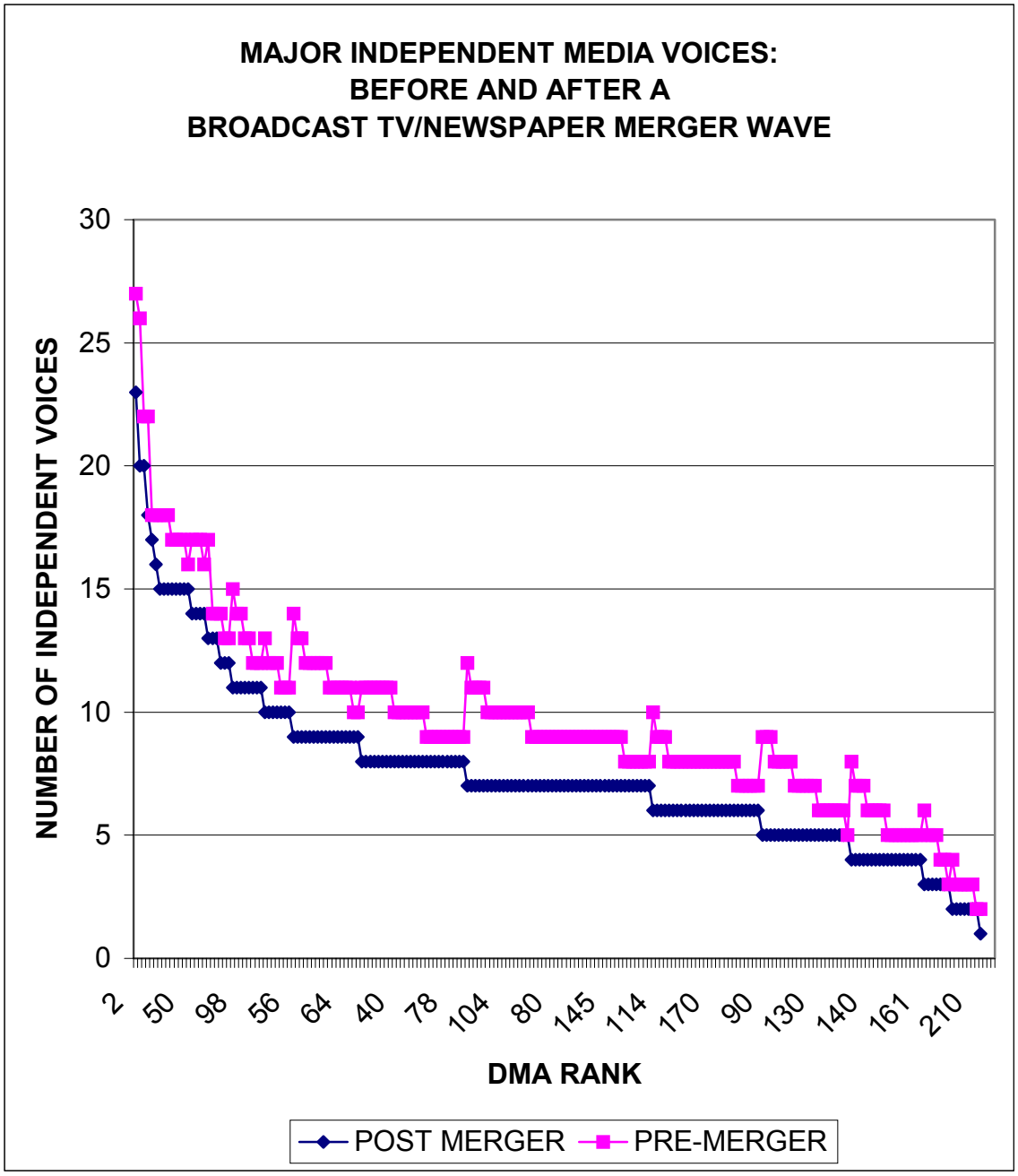
Even on a market-by-market basis, this merger wave would have a dramatic impact. In this analysis, we ask how large a reduction of independent voices would take place within individual markets and ignore effects in neighboring markets. Today, there are about 2,000 independent media voices spread across all 210 DMAs. That number would be reduced to fewer than 1600 by a merger wave between broadcast TV stations and daily newspapers. In other words, the number of independent major local media voices would be cut by one-quarter.

Exhibit IV-2 shows the distribution of DMAs before and after a merger wave, assuming all dailies would end up in combinations. The effect would be devastating, even using the simplistic measure of voices. Such a measure is inaccurate because it ignores that some voices are much louder than others as measured by market share, and it equates newspaper voices with TV voices. Nevertheless, we observe that the percentage of markets on a national level that are considered "unconcentrated" by voice count (i.e., those with ten or more voices), would decline from approximately 42 percent to about 19 percent.

Exhibit IV-2 relies on simple voice counts, which do not properly reflect all information about market structure, since entities with small market shares are counted equally with those with large market shares. Although TV stations and newspapers should not be equated in terms of their contribution to civic discourse, we can capture more of the market structure information into assessing the impact of potential broadcast TV/newspaper mergers by converting the HHIs to voice equivalents. That is, a market with an HHI of 2000

can be said to have the equivalent of 5 equal sized entities. We refer to this as an HHI adjusted voice count.

EXHIBIT IV-2:


MAJOR INDEPENDENT MEDIA VOICES:
BEFORE AND AFTER A
BROADCAST TV/NEWSPAPER MERGER WAVE
NUMBER OF INDEPENDENT VOICES
30
25
20
15
10
5
0
2
50
98
56
64
40
78
104
80
145
114
170
90
130
140
161
210
DMA RANK
POST MERGER
PRE-MERGER

When HHI information is used to inform the voice count analysis, as in Exhibits IV-3 and IV-4, we find that the these markets are much more concentrated than the simplistic voice count approach makes them appear. These Exhibits are based on the markets that would have ten or more voices, by the simplistic voice count, after newspaper/broadcast TV mergers. We have complete HHI information for 31 of the 39 DMAs that fell into this category. These are large markets (average DMA rank of 27).

Exhibit IV-3 shows the simplistic and HHI-adjusted voice count before mergers. Even these least concentrated DMAs are shown to be moderately to highly concentrated. Only four of the DMAs have the equivalent of 10 equal-sized voices based on the combined HHI-adjusted counts for TV stations and newspapers. The remainder falls into the moderately concentrated range.

Exhibit IV-4 compares the HHI-adjusted voice counts before and after the merger of TV stations and newspapers. Again, we assume all newspapers are combined with a TV station. The markets would become quite concentrated. These markets that are moderately concentrated today would fall into the tight oligopoly range after the merger wave.

The impact on the vast majority of markets, which are generally less competitive than these, would be even greater. Exhibit IV-5 presents the HHI-adjusted voice counts for 37 medium sized markets (average DMA rank of 80). About a third of these DMAs are moderately concentrated on an HHI-adjusted voice count basis and two thirds are tight oligopolies. Elimination of the cross-ownership ban would put all of them into the tight oligopoly range. The average number of voices would shrink from seven to fewer than four.

EXHIBIT IV-3:

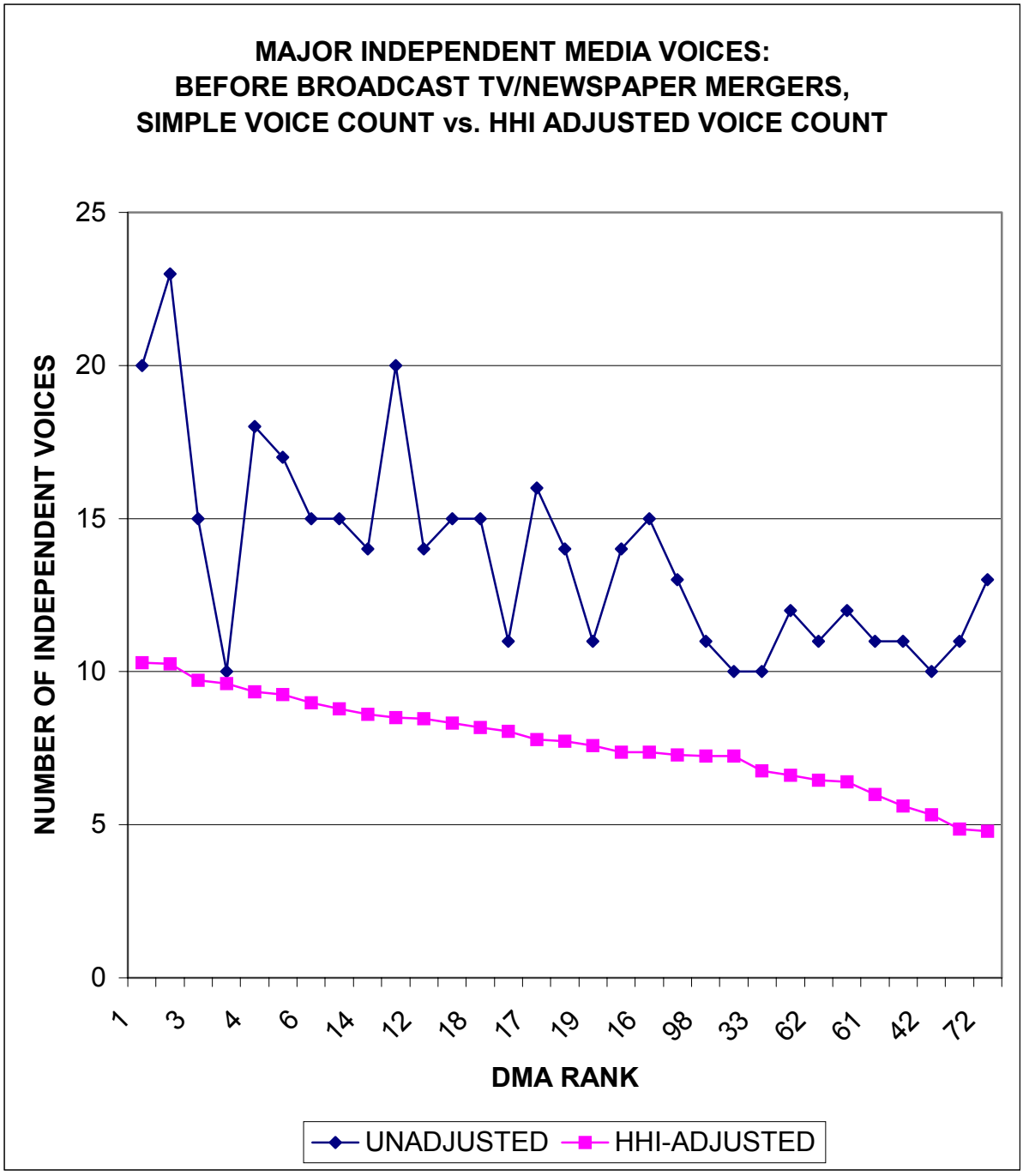

MAJOR INDEPENDENT MEDIA VOICES:
BEFORE BROADCAST TV/NEWSPAPER MERGERS,
SIMPLE VOICE COUNT vs. HHI ADJUSTED VOICE COUNT
NUMBER OF INDEPENDENT VOICES
25
20
15
10
5
0
1
3
4
6
14
12
18
17
19
16
98
33
62
61
42
72
DMA RANK
UNADJUSTED
HHI-ADJUSTED

EXHIBIT IV-4:

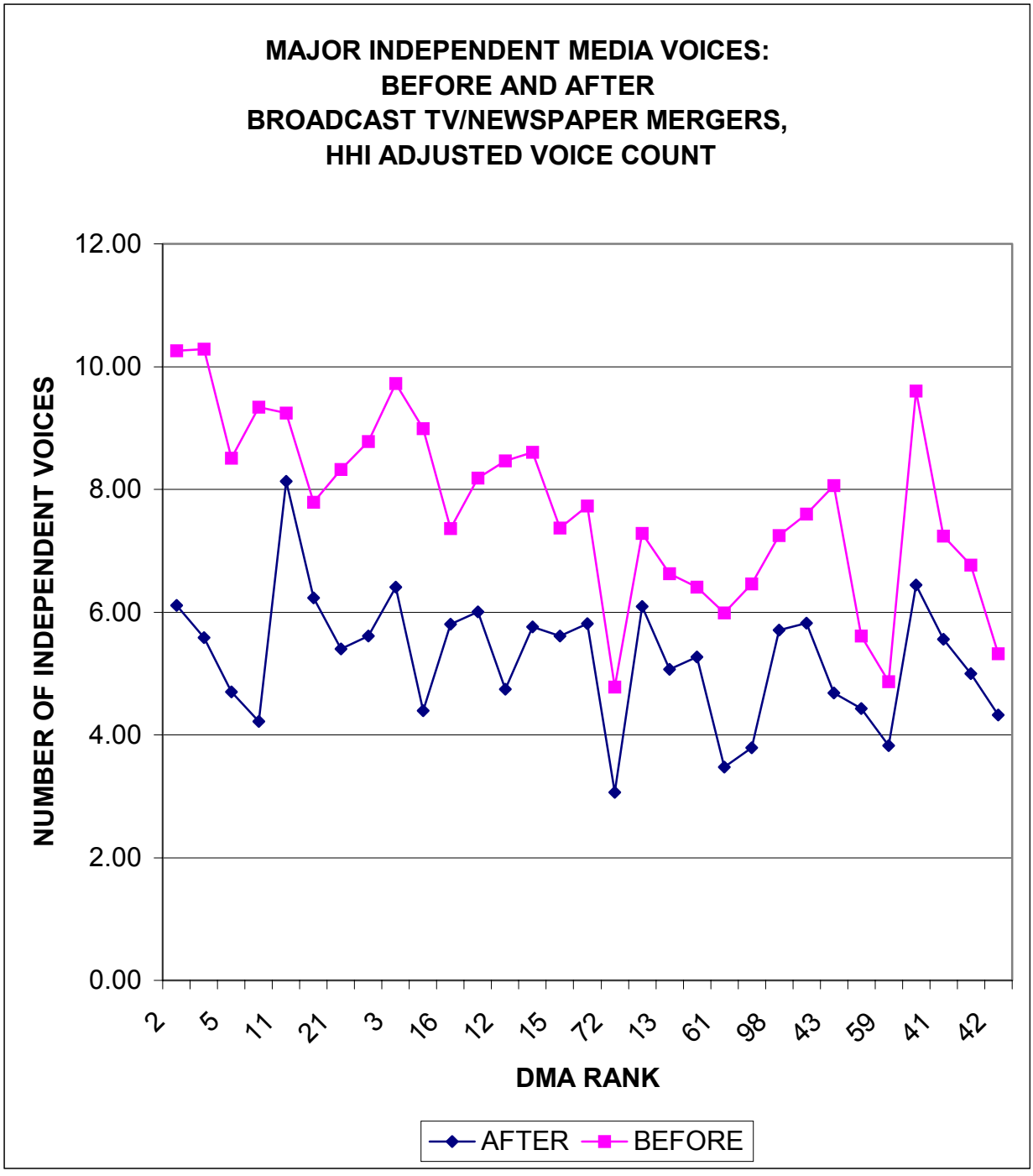
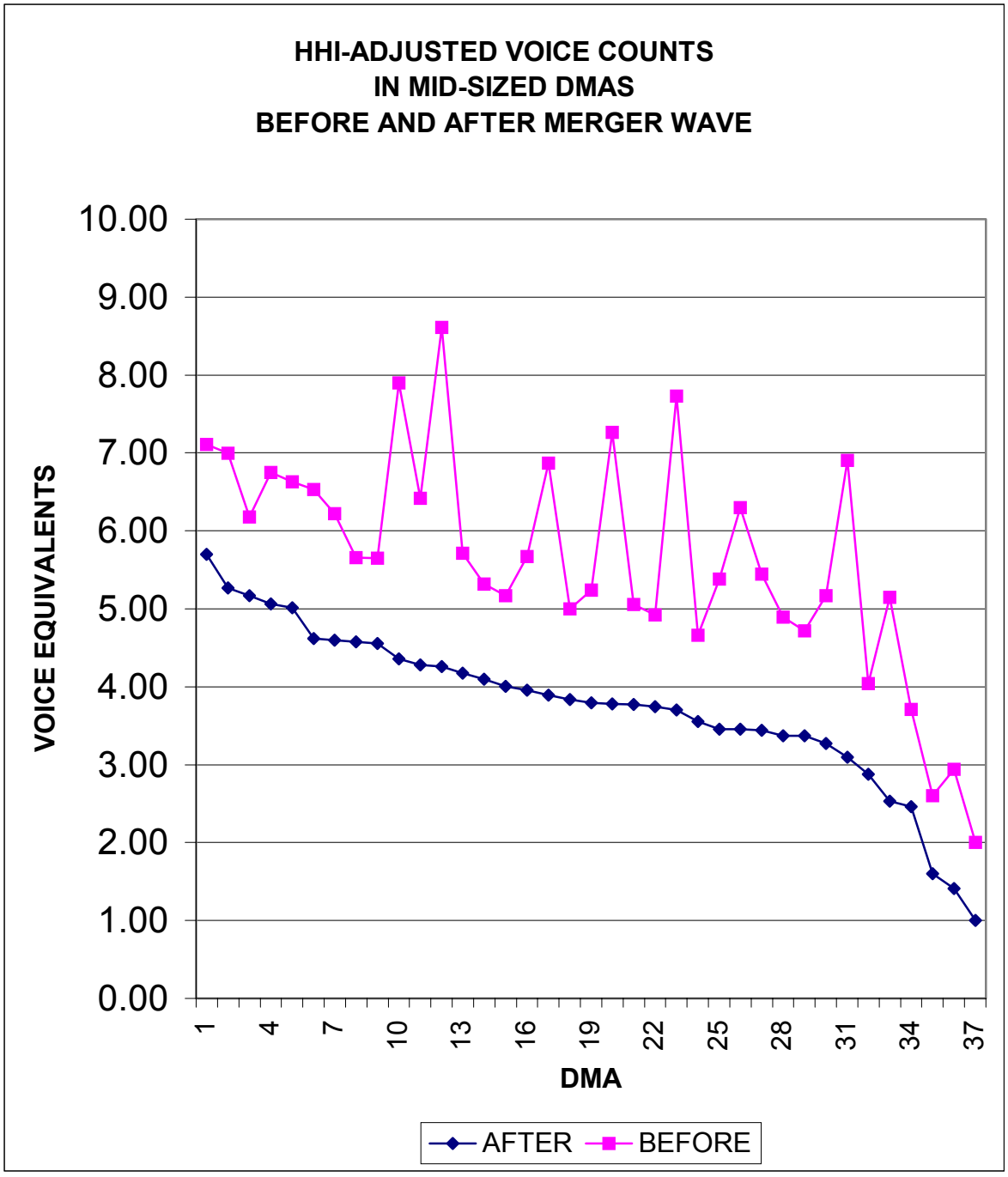

MAJOR INDEPENDENT MEDIA VOICES:
BEFORE AND AFTER
BROADCAST TV/NEWSPAPER MERGERS,
HHI ADJUSTED VOICE COUNT
NUMBER OF INDEPENDENT VOICES
12.00
10.00
8.00
6.00
4.00
2.00
0.00
2
5
11
21
3
16
12
15
72
13
61
98
43
59
41
42
DMA RANK
AFTER
BEFORE

EXHIBIT IV-5:


HHI-ADJUSTED VOICE COUNTS
IN MID-SIZED DMAS
BEFORE AND AFTER MERGER WAVE
VOICE EQUIVALENTS
10.00
9.00
8.00
7.00
6.00
5.00
4.00
3.00
2.00
1.00
0.00
1
4
7
10
13
16
19
22
25
28
31
34
37
DMA
AFTER
BEFORE

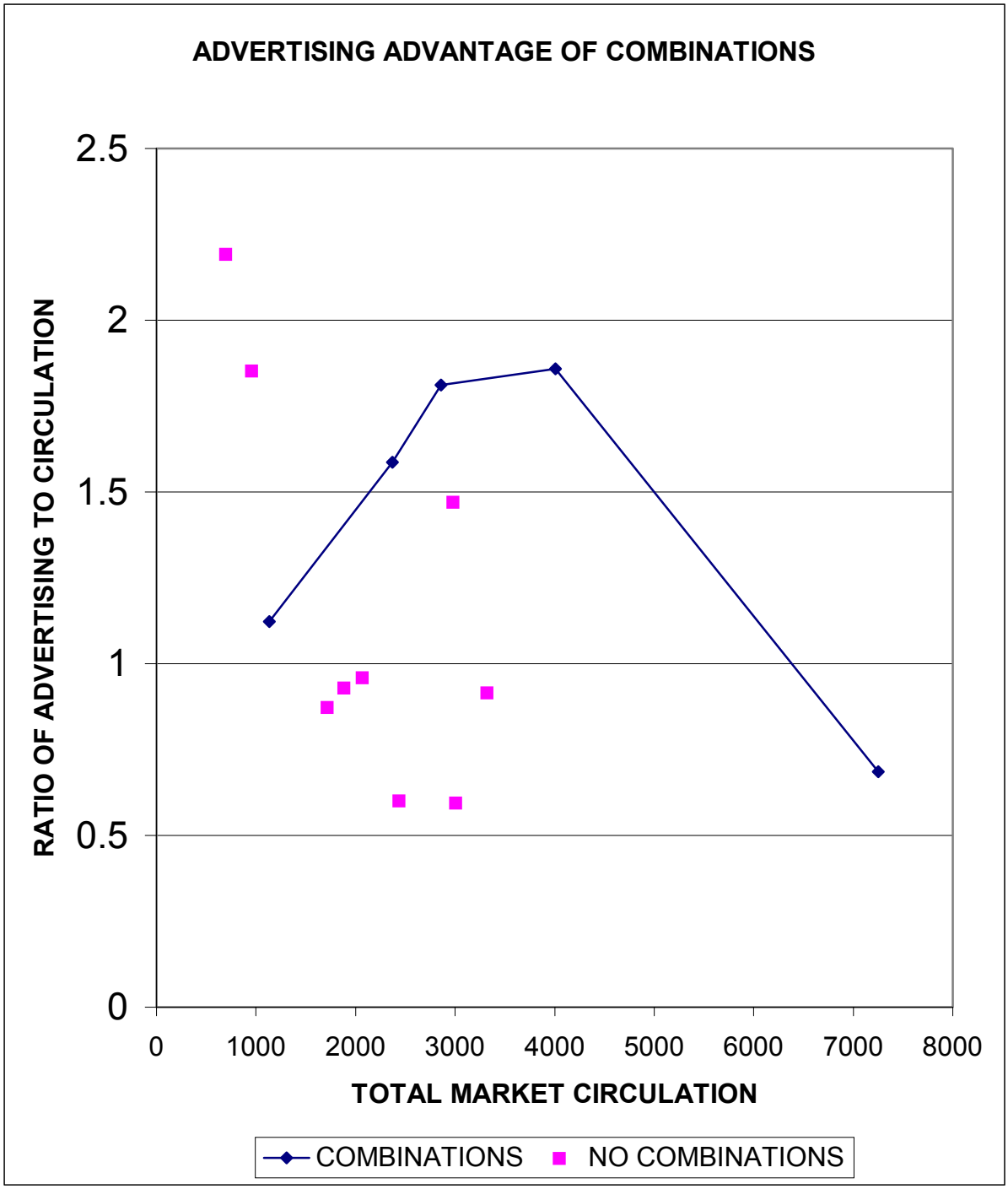
Exhibits IV-4 and IV-5 present the HHI-adjusted voice count for the major media that contribute to civic discourse at the local level. It excludes cable and satellite. Even though cable has made little independent contribution to civic discourse through local news and information programming, one can argue that cable represents a potential additional voice a the local level. This would not alter the fundamental conclusion that these markets are highly concentrated. Satellite has little capacity to deliver local programming.

B. THE URGE TO MERGE WILL BE IRRESISTIBLE

In the previous discussion we have demonstrated that a large number of mergers are likely to take place. This conclusion is reinforced by examining the markets where newspaper/broadcast cross-ownership is currently allowed. These markets illustrate a strong tendency to leverage the cross-ownership of media. The newspaper is promoted vigorously by the broadcast TV station and *vice versa*. One would expect this to have an impact on newspaper advertising revenue. We have compared the advantage gained by a combination in terms of the "disproportionate" share of advertising revenue captured. We estimated this advantage by examining the relationship between circulation or viewers and advertising dollars or revenues. We would expect that partners in combinations attract a larger share of the advertising revenue than their circulation.

Exhibit IV-6 shows the results for newspapers. All the combinations for which we were able to obtain advertising data involved the newspaper that was top ranked in its market for circulation. We calculated the advantage gained compared to the number two papers and compared this with a similar ratio in non-combination markets. The combinations were

EXHIBIT IV-6:


ADVERTISING ADVANTAGE OF COMBINATIONS
RATIO OF ADVERTISING TO CIRCULATION
2.5
2
1.5
1
0.5
0
0
1000
2000
3000
4000
5000
6000
7000
8000
TOTAL MARKET CIRCULATION
COMBINATIONS
NO COMBINATIONS

consistently higher. In every market they garnered a larger share of the advertising market than of the circulation market. They garner about a 25 (simple average) to 30 (weighted average) percent larger share of the advertising market.[26]

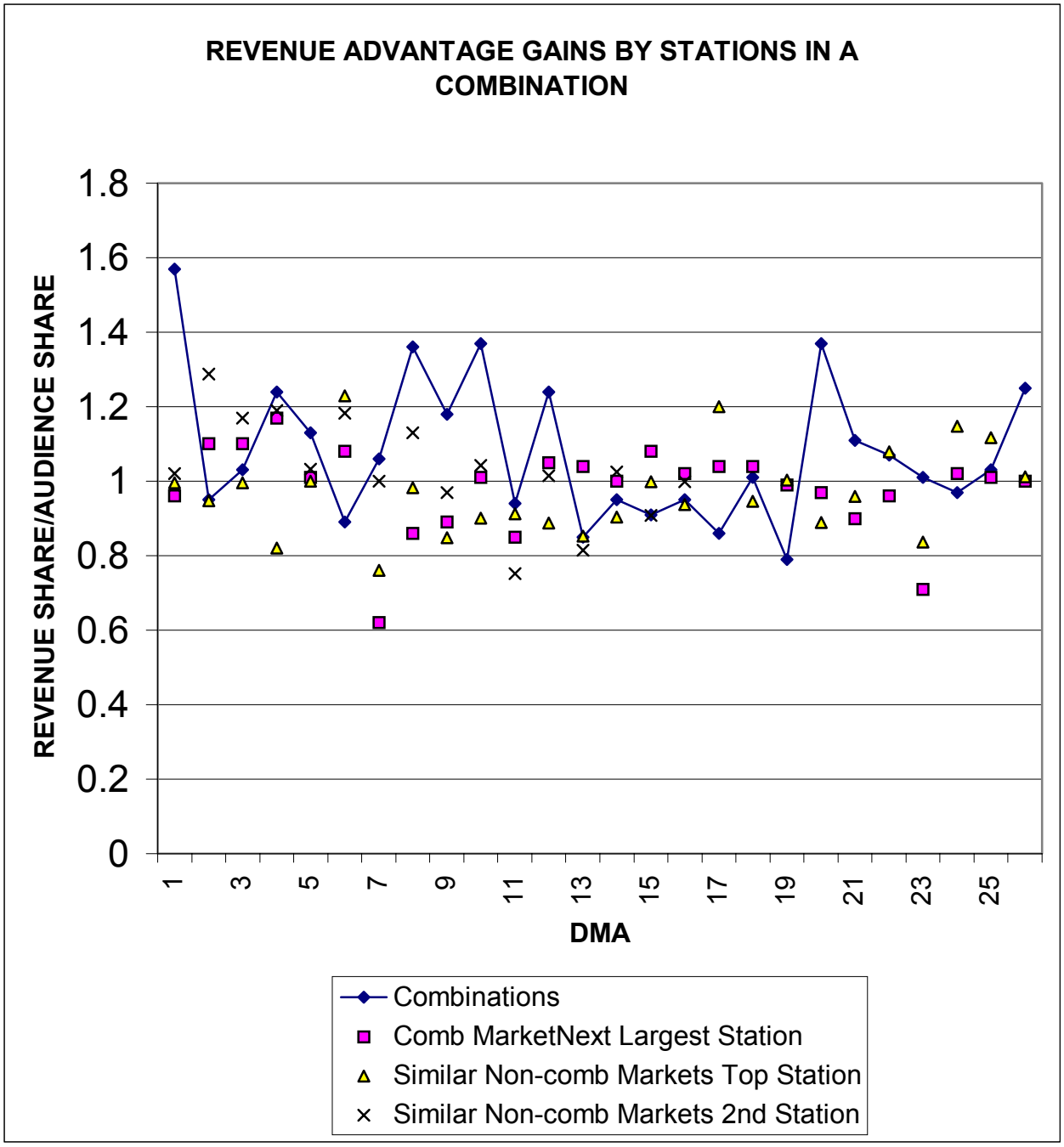
In non-combination markets for which we had data, the pattern was quite different. In two-thirds of the markets, the leading circulation paper had a smaller share of the advertising market. On a simple average basis, however, it was 19 percent larger. This was still less of an advantage than the combination papers enjoyed.

Exhibit IV-7 shows the results of a similar analysis for broadcast stations in combinations. We again observe an advantage, measured by a comparison to the next largest, non-combination TV station within the same market, or to similarly ranked TV stations in non-combination markets. Combinations result in TV stations garnering a share of the revenue market that is about 8 percent larger, compared to non-combination stations, than their relative share of viewership.[27] This is true for both other stations within the combination market and similarly ranked stations in similarly-sized DMA.

These findings should come as no surprise. Combinations are intended to increase the profitability of the media companies. Unfortunately, because there are so few newspapers, the advantaged gained by combinations will undermines competition in TV markets. The combined, dominant media firm will gain an insurmountable advantage over others in the market. Ultimately, the reduced competition will have its inevitable effect to diminish diversity in the market.

[26] The weighted average difference is statistically significant; the simple average is not.
[27] All differences between combinations and noncombination comparison groups are statistically significant.

EXHIBIT IV-7


REVENUE ADVANTAGE GAINS BY STATIONS IN A COMBINATION
REVENUE SHARE/AUDIENCE SHARE
1.8
1.6
1.4
1.2
1
0.8
0.6
0.4
0.2
0
1
3
5
7
9
11
13
15
17
19
21
23
25
DMA
Combinations
Comb MarketNext Largest Station
Similar Non-comb Markets Top Station
Similar Non-comb Markets 2nd Station

C. THE LACK OF INDEPENDENT VOICES

Steve Kimber, having seen first hand "the threats to freedom of expression that can result when one company owns a newspaper and television station in the same market," summed up his view of the dispute with CanWest that led to his resignation by citing A.J. Liebling as follows:

> "Why shouldn't freedom of the press, as legendary press critic A. J. Liebling once put it, be 'guaranteed only to those who own one?'
>
> Because, quite simply, real democracy depends on the free flow of ideas, of debate and disagreement. And newspapers are the best forum for those debates.[28]

Although the Commission cites the growth of the total number of radio stations as well as cable TV channels, what the Commission slights is that concentration of ownership has grown faster. The best and most startling, given the source, summation of the problem with citing the growth in cable TV channels comes from none other than *Broadcasting & Cable* magazine, which has long been a promoter of the Telecom Act and other media deregulatory moves. In the October 10, 2000 issue, Editor Harry Jessel powerfully summarized the developments (his journalistic instincts overcoming the cheerleading tendencies of the magazine).[29] After noting the good/bad old days of TV dominance by the original three networks, he says:

> Over the past several years, the TV business has been consolidating rapidly as a result of liberalized federal ownership rules. We are now back at a point where you can reasonably argue that the business is controlled by just five companies: Disney, Viacom, News Corp., NBC and [AOL-]Time Warner. Slowly, inexorably, the five have reassembled the prime time audience that many believed had been permanently dispersed in the 1980s.... Today's giants,

[28] "CanWest Claims First Victims: Montreal Staff Yanks Web Site; Two Columnists Quit When Censored," *The Newspaper Guild*, January 18, 2002.
[29] Jessell, Harry A., 2000. "Get set for Network II," *Broadcasting & Cable*, October 10, p.16.

with all those networks, have a combined 86% share by our reckoning. (Emphasis added.)

The existing concentration problem in local areas is also fundamentally at odds with a genuine diversity of voices, again, especially in the main media. Look at the current situation in the following areas. Some, with grand fathered cross-ownerships and duopolies, are illustrative of what will happen in other localities if this cross-ownership rule is rescinded; others show how bad it is now, a situation that will worsen with the buyout binge that will surely follow elimination of the rule.

The paucity of voices in other combination markets underscores the vulnerability of civic discourse. We would be remiss if we did not note at the level of individual markets how highly concentrated media ownership is. Here we include some comments on radio ownership, to remind the Commission how quickly these markets will become concentrated should the rule be eliminated.

Chicago: The third largest DMA has just 3 big media corporations, Tribune Co., Viacom-CBS & Clear Channel, control the dominant metro newspaper, 2 TV stations, and at least 15 radio stations. When including Disney-ABC, just 4 Megamedia control the dominant newspaper, 3 TV stations, and at least 20 radio stations. They each have prominent Internet presences, locally and nationally, and the main media presence to prodigiously cross-promote the Internet site, which they do.

As with each of the following areas and many others, three to five of these companies and five or six other big media companies are dominant in local area after local area around the nation. Further, the CBS-Infinity radio stations are mostly among the largest stations in their areas, as is often the case with Clear Channel's stations in larger cities.[30]

[30] Albiniak, Page. 2001. "A Cloud over Clear Channel," *Broadcasting & Cable*, November 11, p.10.

This is then genuine dominance of news, information, and opinion, as well as much of entertainment. It means dominance of ad revenue in the local area along with being able to offer package deals across media outlets in the area and elsewhere. Various reports have shown the CBS-Infinity radio stations have a third or more of radio ad revenue in a number of local markets. This, in turn, means it is harder and harder for purely local, single outlet media companies to compete, especially minority-controlled and oriented media.

Phoenix, Ariz.: The 16th ranked DMA has just 4 media corporations – Viacom-CBS, Clear Channel, Gannett & Paxson (33% owned by GE-NBC) – control the metro paper, 3 TV stations, and at least 11 radio stations.

Pittsburgh: Especially with the duopoly rule eliminated, Pittsburgh, 20th-ranked TV market, now has only 3 companies – Viacom-CBS, plus Clear Channel and Sinclair Broadcasting – that control 4 TV stations, and either 4 or 10 radio stations or more (depending on the information source re: Clear Channel). The metro paper, the *Post-Gazette*, is independently-owned. But if the cross-ownership rule is rescinded, this opens wide the possibility of a buyout by one of those 3 corporations or by Hearst-Argyle, for example, which owns one of the other Pittsburgh TV stations, along with over 30 other TV stations, a dozen or so newspapers, etc. nationwide. Again, it would be a serious constriction in the diversity of the sources of news, information and opinion for Pittsburgh citizens.

Hartford, Conn.: In this 28th-ranked TV market and 44th-ranked radio market, just 3 media corporations – Viacom-CBS, Tribune Co. & LIN TV – control the metro paper, 4 TV stations and at least 4 radio stations.

Dayton, Ohio: The 60th ranked DMA has just three media companies – Cox, Clear Channel, and Sinclair Broadcasting – control the metro newspaper, 3 TV stations, and at least

13 radio stations. Cox controls a series of suburban daily and weekly papers and has "the only comprehensive news, weather, sports, etc. Web site – ActiveDayton.com – serving the entire metro area. It is the only significant local presence on the Web." Indeed, "the vertical integration Cox has developed in this region is astonishing." (Editor, *Impact Weekly* of Dayton.) This is in the 56th-ranked TV and radio market, with less than a million population (2000) in the entire SMSA.

When the alternative weekly wrote of a radio format change on a station in the area owing to an ownership change and then listed the consolidated radio ownership of the radio stations in the area, a big advertisement scheduled for Clear Channel (timed to coincide with a big rock festival) was summarily pulled by Clear Channel. They accused the weekly of "anti-Clear Channel journalism." This was an example of how the media giants seek to intimidate smaller media and thwart the diverse voices and cross-checking that democracy requires. Instead of cross-checking, the FCC threatens America with a great increase in cross-ownership.

Clear Channel controls at least 65 radio stations throughout Ohio. Further, in November 2001, it was revealed that Clear Channel, which already owned 3 of the 4 radio stations in Chillicothe, Ohio, was attempting to buy the 4th radio station in the town. Through secretive agreements, they had actually controlled the 4th station, WKKJ, for two years (Albiniak, 2001). On radio, Clear Channel's influence simply blankets the state. If they are allowed to start buying newspapers, an already bad diversity situation will be severely worsened.

And we see the same pattern in Atlanta, Columbus (in addition to the Dispatch media, Viacom-CBS owns a TV station and 3 radio stations, and Clear Channel owns 5 more radio stations), Dallas, Milwaukee, Tampa and other areas around the nation.

D. CONCLUSION

We believe that cross-promotion represents leverage in the advertising market, which increases the likelihood of mergers. When all is said and done, the only reasonable expectation is for virtually all newspapers to be affiliated with television stations. On a market-by-market basis, this process would slash the number of major independent voices by one-third. On a national basis, it would cut them by 40 percent. Most importantly, in these media markets, the number of owners of major media outlets is extremely small, a handful in most cases. This is not a public policy debate about the difference between having fifty or fifty-one major media outlets, it is, on average, a debate about the difference between have five versus three.

Public policy should lean strongly against allowing such a staggering loss of independent voices in local media markets. As McChesney and Miller put it in their attached statement

> unless there is overwhelming evidence that permitting media firms to own more media than they are presently permitted to own will improve the caliber of our media system dramatically for the vast majority of Americans, the operating principle should be to maintain the regulatory status quo, or even consider tightening media ownership regulation.

This part of the comments has shown that the overwhelming evidence points in the opposite direction. Allowing media owners to control major media outlet of different will dramatically diminish the number of major independent voices. In quantitative terms, it will reduce the caliber of our media system.

Freidland emphasizes the permanent damage that an ill-considered relaxation of the cross-ownership ban would cause.

> [T]he constriction of the flow of news in the local environment is a foregone conclusion of the proposed Commission action. The only question is how much, and with what effect on local democratic life?
>
> Regardless of whether the Commission accepts this proposition, surely it has an obligation to investigate the real effects of further concentration on local news that newspaper-broadcast cross-ownership would bring . The studies that we have discussed show clear long-term damage to the local news environment, and clear benefits to the public when that environment is flourishing. This kind of community social capital is a scarce resource. Once it is destroyed, it cannot be easily replenished. At minimum, the Commission has a public obligation to conduct a serious investigation of the effects of further concentration on the local news environment before it acts.

The next part of the comments shows that eliminating the would also diminish the caliber of our media system in qualitative terms.

PART III:

THE INSTITUTIONAL EFFECTS OF CROSS-OWNERSHIP

V. LOSING VOICES AND CRITICAL ELEMENTS OF DIVERSITY THROUGH NEWSPAPER-TV COMBINATIONS

The initial submission of Consumers Union, et al., cited *Megamedia*, written by Dean Alger, one of the main contributors to this section,[31] to the effect that "the television networks' failure to cover Congress' decision to grant broadcasters free additional spectrum for digital television." This is part of a broader issue leading the way to some vital research that provides compelling empirical evidence for the necessity of retaining the prohibition against a single corporation controlling both a – usually *the only* – newspaper and a TV station in the same area/media market. The analysis examines two primary areas of concern – undermining antagonism in the coverage of (self-interested) issues, and erosion of journalism through conglomeration (cultural clashes between the media) and merger (denial of resources driven by profit center mentality).

A. THE IMPORTANCE OF THE MAJOR MEDIA

First, we re-emphasize the importance of the dominant media voices in civic discourse – TV and daily newspapers. Theory and research documented by Alger in *The Media and Politics*[32] show that the main mass media have become central factors in politics and the policymaking process. Because of its particularly pervasive presence in peoples' living homes and because enormous attention is given to it, television is a uniquely powerful force.

[31] Alger, Dean, 1998. *MEGAMEDIA: How Giant Corporations Dominate Mass Media, Distort Competition, and Endanger Democracy*. Rowman & Littlefield Pubs.

Correspondingly, as the cases discussed below dramatically demonstrate, it is critical to have another *main* mass media outlet in the same area that can serve as a check on the TV stations' powerful communications. No other media outlet comes remotely close to the main metro area newspaper in being in prime position to do so, reaching major portions of the public, to help provide the needed cross-media accountability.

As the Roper and Pew Research Center surveys and other evidence have continued to show, the major local newspaper and news shows on the local VHF TV stations are the main media most of the public rely on for news and information. Major metro newspapers are the central source of opinion expression in local areas. Eliminating the local cross-ownership rule, which Wall Street and other analysts predict will lead to another frenzy of buy-outs, will mean that citizens in the local areas will not have a prime media outlet to look to for a unique, independent perspective, especially on electronic-media policy issues.

The offering of editorial opinion, especially of outside opinion, is one of the crucial differences between the mass medium of newspapers and of TV, putting them in different markets. This is about the main media outlets with truly general public audiences, rather than those with small, specialized fragments of the public, like radio, the Internet and cable TV, etc. Broadcast TV and newspaper are the main forums of democracy.

That is an ever more critical function in today's world, especially with the increasingly immense set of media properties controlled by the giant media conglomerates. Because these main media dominate the public arena, typically they set the agenda for, and define the nature of, public discourse on major issues.[33]

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[32] Alger, Dean E. 1996. *The Media and Politics*, 2nd ed. Originally published by Wadsworth, now owned by Harcourt Brace College Pubs.

[33] For a review of social science research on agenda-setting by the media see *The Media and Politics*, 2nd ed., pp.160-164.

To draw on a key term and concept the Commission has employed, a newspaper truly independent of the ownership of the local TV stations (and ideally, independent of a company with TV ownership elsewhere, given the earlier evidence) provides a different "voice" in the main media most people rely on in the dialogue of democracy. That is especially vital in the local area and for local and state issues.

B. ANTAGONISM BETWEEN THE MEDIA

The key to different and diverse voices is the passage from the Supreme Court opinion in the Associated Press case is a seemingly peculiar word, antagonistic. Antagonism of news, information, and ideas is "essential to the welfare of the public" in civic discourse because the absolute foundations of the American democracy, the media of news and opinion, must be separately-directed organizations that would be institutionally able, unfettered, and inclined to thoroughly challenge the news, information and opinion coming from other media organizations in the field or geographic area. The substantial evidence below, as well as in *Megamedia* (see Chap.6), which includes ample empirical evidence and testimony of those directly involved, effectively refutes any claim that, as a rule, separate divisions of the same media or industrial-media conglomerate will pass muster on that foundational test of the First Amendment responsibilities of the news media.

It is somewhat ironic that the industry commenters in this proceeding have made an important aspect of the case for us. Their repeated statements that joint ventures are not an effective means for capturing economic efficiencies underscores the important role of antagonism. In other words, they claim that independent entities in joint ventures are too difficult to keep in line.

> Tash sees advantages to partnering, including the ability for both companies to maintain separate and independent voices.
>
> "Anything you do ends up being in partners' interest rather than being forced through common ownership," Tash says. "If it's common ownership, you might add up the pluses and minuses and decide it's a net-plus, even if it's a net-minus for one partner. In this relationship, it has to be a net plus for both.
>
> Tash admits that partnerships with other media companies can be tricky. "You can't rely on orders from a common owner to work through issues that arise."[34]

This issue plays out in an interesting way in the comments of the advocates of combinations. Industry commenters who favor elimination of the rule cite the proliferation of media variety as the changed market conditions that justify a rule change.[35] Having demonstrated in our prior comments and above that media such as the Internet are not effective substitutes for newspapers and broadcast television, in the section we show that diverse ownership—not media variety—is the essential proxy for antagonism.

Industry commenters contend that "commonly owned media outlets cannot realistically be considered a single 'voice' in evaluating diversity."[36] They urge the Commission to rely on their corporate policies of editorial separation between media entities as the policing mechanism that will ensure diverse information presentation. For example, Gannett tells us that it has a "firm corporate policy of assuring the editorial and journalistic autonomy of the individual newspapers and television stations it holds across the country [that] has been maintained in the context of its common ownership of a newspaper and a

[34] Lisa Rabasca, "Benefits, Costs and Convergence," *Presstime*, p. 3.
[35] See, e.g., Hearst-Argyle at 4-5; Gannett at 21; NAA at v.
[36] Gannett at 15. See also Comments of Newspaper Association of America at vii (stating that "the Commission has no factual basis for assuming that common ownership necessarily reduces the print and broadcast media to a single, monolithic viewpoint").

television station."[37] However, not only can corporate policies change rapidly, but also many joint owners clearly do not behave this admirably.

In this part we examine many of the markets where industry commenters claim that cross-ownership has led to model behavior from media entities, and that any harm that may be caused by cross-ownership is purely speculative.[38] However, we find that under closer scrutiny, these cross-owned entities do not have the independence claimed by their ownership groups, and the harm caused by cross-ownership is indeed quite real.

C. BIASES IN THE COVERAGE OF THE TELECOMMUNICATIONS ACT OF 1996, ANOTHER LOOK AT SELF-INTERESTED COVERAGE

Before we look at specific examples, we note that it is not necessary to rely only on anecdotal evidence about the problem of weakening of the coverage of issues in which owners have interest. The analysis of the networks' coverage conducted by Alger used the Vanderbilt TV News Archive to assess how the three prime network news shows covered the Telecom Act of '96 – as a whole, not just the spectrum give-away issue – as it went through the congressional process. The analysis found that the ABC, CBS and NBC network news combined devoted only 19.5 minutes to the Telecom Act during the entire 9 months it was in the process (early May '95-early February '96); and most of that was about the v-chip and the "Internet Decency Act" side issues.

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[37] Gannett at 12.

[38] While many of the industry commenters are quick to point out that the original rule was based on "regulatory *supposition*," See Hearst-Argyle Television, Inc. (Hearst-Argyle) at page 5 (emphasis in original), that does not preclude those same industry commenters from using conjecturally supposed benefits to call for repeal of the rule, while ignoring actual evidence of harm from cross-ownership situations. For instance, Hearst-Argyle notes that "Media companies that own both newspapers and broadcast stations *often* follow policies of editorial independence. Indeed, the evidence adduced to date does not suggest that common ownership of co-located broadcast stations and newspapers results in less editorial or journalistic autonomy." Id. at 16 (emphasis added). It is pure conjecture on Hearst-Argyle's part, denoted by its use of the word "often," that there is the kind of editorial independence, on a universal basis, that would be necessary to support a repeal of the cross-ownership rules. It is this question of "less editorial or journalistic autonomy" that Commenters explore in this section.

Most crucially and tellingly, there was essentially no meaningful coverage of the elimination or reduction of ownership limits and the probable consequences of such actions for more concentrated control of mass media, nor was there meaningful attention given to the give-away of the extra spectrum for transition to digital, high-definition TV. Thus, the failure of coverage was actually broader than noted in Consumers Union's et al. original submission and of even more profound concern regarding failure to inform the public on a pending policy decision which would greatly benefit the media corporations and which had profound implications for democracy and the public good.[39]

The National Association of Broadcasters, in conjunction with local TV stations, produced and abundantly aired what they called "public service ads" (sometimes aired as editorials) arguing for the give-away of the additional spectrum to the TV station owners. The main theme of the ads/editorials was that there was a threat to "free over-the-air broadcasting as we know it" and that there would be a big "tax on free TV" – which referred to the proposal to auction off the extra spectrum, rather than give it away. The *Charleston Daily Mail* newspaper reported: "In an unprecedented move, four local [TV] stations combined to air messages alerting viewers to HDTV proposals now pending in Congress.... At 6:27pm and 11:32 pm each station aired" the message simultaneously.[40] With consummate chutzpah, NAB later included the total airtime cost of these ads in their assessment of the local public service TV stations were providing!

From research on newspaper coverage of those ads, political scientists Snider and Page could find "no cases in which *opposing views* on the spectrum give-away" were

[39] Also see Karr, Albert.1996. "Television News Tunes Out Airwaves Auction Battle," Wall Street Journal, May 1, p. B1

presented by the TV stations.[41] That there was a newspaper that was owned independently of the TV stations was obviously crucial to having independent reporting on these biased TV presentations – by *all* the stations in the area.

Furthermore, Snider and Page looked at media corporations that owned newspapers along with having significant TV station ownership (at least 20% of revenues from that source) and compared their editorial stands on the spectrum give-away/auction issue to the stands of newspapers owned by companies having little or no TV station ownership. They looked in Lexis-Nexis at papers that had editorialized on the spectrum giveaway vs. auction issue when the principal debate was happening. The findings were striking: "The results on editorials are very strong and highly significant [statistically]; in fact, among newspapers that editorialized on the subject, every one whose owners got little TV revenue editorialized against the spectrum 'giveaway,' whereas every one with high TV revenues editorialized in favor of giving broadcasters free use of spectrum."

Other indications, including the observations of members of Congress like Sen. McCain and Sen. Dole, suggest the pattern is a general one. For example, on December 23, 1995, The *San Francisco Chronicle*, owned by the same company which owned KRON-TV in San Francisco at the time, prominently editorialized that with the telecom bill, "American consumers will benefit from an astonishing bonanza of dazzling new communications services and, eventually, lower prices..." and admonished Congress to "get it wrapped up." There was no mention in the editorial of the easing of ownership limits or other benefits the TV station owned by the Chronicle Co. would receive, and though we did find one earlier

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[40] Snider, James H and Benjamin I. Page. 1997. "Does Media Ownership Affect Media Stands? The Case of the Telecommunications Act of 1996." Paper delivered at the Annual Meeting of the Midwest Political Science Association, April., pp.7-8)

[41] Snider and Page, p. 8. p.8.

Chronicle news article that noted some of the doubts raised about the bill, two larger, page one news articles in that period dealt with the bill in approving fashion.

Further loosening of ownership limits through the proposal to end the local cross-ownership rule has been editorialized favorably by papers in companies with TV interests. For example, on July 31, 2001 the *Chicago Tribune*, owned with TV and radio stations WGN, etc., castigated Sen. Hollings for "putting the future on hold" when he asked for more detailed review of the move to end the local newspaper-broadcast cross-ownership rule.

There is more evidence in this line. Political scientist Martin Gilens and his colleagues took the list of the 100 largest media corporations and looked at those with newspapers but no TV holdings, those with five or fewer TV stations, and those with nine or more TV stations, to see how they covered the easing of ownership limits in the Telecom Act. They looked at news coverage, rather than editorials. The findings are not as stark, but: "Twenty-two percent of stories in the 'no TV ownership' newspapers mentioned that the loosening of the [ownership] caps would result in fewer media companies owning the nation's TV stations. In contrast, only 2% and 11% of stories from the 'limited TV ownership' and 'substantial TV ownership" papers brought this to their readers' attention."[42]

It is telling that the industry trade magazine *Electronic Media* commented in early 1996 that "media barons have been lucky to keep the Telecommunications Act far from the consciousness of most Americans"[43] In broadcast media, it wasn't merely "luck," it was a refusal to cover this crucial issue, and American democracy was the "unlucky" one.

[42] Gilens, Martin and Craig Hertzman. 1997. "Corporate Ownership and News Bias: Newspaper Coverage of the 1996 Telecommunications Act." Paper delivered at the Annual Meeting of the American Political Science Association, August, p.8)
[43]Snider and Page, 1997, p.14.

In later 1995 through January 1996, the American democracy badly needed a widespread discussion and debate, with fulsome presentation of information and alternative perspectives, on this major and hugely consequential set of changes in telecommunications policy. Instead, the public was badly served and those who relied primarily on TV news or newspapers in corporations with TV properties as their "main source" of news were largely kept in the dark. To the extent the general public was at all meaningfully exposed to the issues in the Telecom Act through the main sources of news and opinion expression, as best we can tell, it was newspapers owned independently of TV interests that brought the issue to the public and editorially presented an alternative perspective. This is a powerful indictment of the idea of rescinding the local newspaper-broadcast cross-ownership rule.

VI. REPEATED FAILURES OF CROSS-OWNED MEDIA TO EXERCISE THEIR WATCHDOG FUNCTION

A. TAMPA

For out first example of the fundamental problem that cross ownership poses to the role of the press in providing antagonistic sources of information, we can turn to Tampa, which is frequently offered as the poster-child for media convergence. In Tampa, Florida, Media General, Inc. (Media General) owns both the *Tampa Tribune* newspaper and WFLA-TV. Recently it has taken both operations and housed them under one roof, yet the decision to co-locate led to a loss of editorial and journalistic integrity even before the actual move:

> Others wonder how the cozy, inbred relationship between the newsrooms might affect their coverage of each other. *Tribune* TV writer Walter Belcher offered a chilling example, saying editors forced him to lay off criticism of WFLA for nearly a year prior to the opening of the News Center [which housed the *Tribune* and WFLA news operations in the same space to facilitate their integration], supposedly to avoid ill will between the staffs. "I told them that maybe I should just stop writing about TV altogether," Belcher says with a laugh. "I eventually went back to [covering WFLA]

> in February, but I still felt like I had to be careful and explain some things more clearly."[44]

Unfortunately, such chilling of free speech in a newsroom is no laughing matter – and not the only example in which Belcher's coverage of WFLA came under scrutiny from joint management. Belcher's coverage of WFLA was compromised further when managers at WFLA requested that he not write about speculation that a reporter would be leaving the station to follow her husband, a former WFLA reporter who moved to another station in Alabama.[45] How many other stories were not pursued because of the new camaraderie between the now joined at the hip *Tribune* and WFLA staffs?

The ultimate concern about the loss of antagonism is to undermine the quality of journalism on both the broadcast TV and newspaper sides.

> Eric Deggans, TV critic at the competing St. Petersburg Times, said convergence can be a good thing but cautions that monopolizing a market with leaders in both print and television could affect a company's news product.
>
> "I think news organizations have to be very strong journalistically to avoid conflicts of interest and to avoid the abuse of power that can come by owning so much of the media landscape," Mr. Deggans said. "The concern is that there will be a party line regarding stories. We need to see how they tackle issues like that. I think people in this market have serious concerns about it.[46]

Oddly enough, Media General, in its comments to the Commission, opines that "it is Tampa that to date best illustrates the company's approach to convergence."[47] Given the demonstrable "loss of editorial or journalistic integrity" in Tampa, Media General's showcase example of "the company's approach to convergence" makes a solid case for retaining the newspaper/broadcast cross-ownership rule to prevent the kind of abuses seen in Tampa.

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[44] Joe Strupp, "Three Point Play," *Editor and Publisher*, August 21, 2000, p. 23.
[45] Strupp, page 19.
[46] Wang Karissa, S., "Tampa's Media Barn,"
[47] Media General at 6.

B. QUINCY

Quincy, the smallest media market in the country which has grand fathered newspaper/broadcast cross ownership (held by Quincy Newspapers, Inc., hereafter, "QNI") is cited by industry commenters[48] as another example where convergence has been a shining success; yet, the allegations raised in a lawsuit pending against QNI show the extreme dangers present in a market where a company can gain control over both print and broadcast outlets. QNI is a media holding company that owns at least fifteen media properties, including the Quincy Herald-Whig, a newspaper, two television stations (WGEM-TV and CGEM-TV), and two radio stations (WGEM-AM and WGEM-FM). It is privately held by the Oakley and Lindsay families. The Tri-State Shopper (TSS) is a small advertising publication that was attempting to compete with QNI for advertising sales.

QNI allegedly threatened its customers that if they did any business with TSS, they would raise their prices; if they chose to do business with QNI at the exclusion of the Tri-State Shopper, they would be given free or below cost advertising in QNI publications. Given QNI's control of such a large number of media properties, for a company that had advertising needs beyond the scope of a small weekly shopper, the choice was clear: do business with QNI or don't advertise.

Furthermore, the Quincy Area Convention and Visitors Bureau is housed in the Oakley-Lindsay Civic Center. The Visitors Bureau publishes an annual "Quincy Illinois Visitors Guide," which is a guide to businesses, media, etc., in the Quincy area. This visitors guide is produced with state funding, and about 75,000 copies are distributed every year to tourists that visit Quincy. Curiously, this visitors guide makes no mention of any media

[48] See NAA at 28.

properties other than those held by QNI.[49] Apparently, the Quincy Herald-Whig handles the advertising for the visitors guide – the lawsuit alleges that only QNI aligned properties were contacted for advertising in the guide. A new business moving into Quincy would be likely to use this visitor's guide to find places where he or she could advertise, but with no mention of non-QNI aligned properties, it would be difficult to find competitors.

Granted, this information surfaced in the context of an antitrust lawsuit—some might argue that this very fact shows that a prophylactic rule is unnecessary to prevent these harms, i.e., it can be addressed properly through antitrust. However, it is only because in this instance that there were clear examples of economic harm that it is addressable through antitrust. Had the predatory behavior been a more subtle leveraging of broadcast and print properties to prevent certain information from becoming public, or an attempt to color coverage to benefit the owner, there would not be such clear economic harm. It is perhaps likely that the information would never have surfaced in the first place. When the stakes are higher than just the market for advertising – when they are raised to the level of important civic debate – we cannot wait for remedies after-the-fact. This is precisely why a prophylactic rule is critical.

C. DALLAS

A. H. Belo Corporation (Belo), owner of the *Dallas Morning News* and WFAA-TV argues in its comments that its joint ownership of the *Morning News* and WFAA-TV "has had no noticeable impact on the intense level of diversity and competition in the Dallas/Fort Worth marketplace."[50] That is likely because of Belo's decision that the *Morning News*

[49] See Quincy Illinois Visitors Guide, 2001edition.
[50] Belo at 8-9.

should stop all TV criticism in order to stay away from any critical reporting about its sister station.

> Then there is a question of how the *Morning News* would cover the station. Because the two share Belo as a parent, the newspaper has often been criticized as being too soft on its sibling. But now that the two were officially partners, the News decided it could no longer cover WFAA objectively. Rather than exclude the one station from its coverage, the *News* halted all TV criticism.[51]

Not only was the *Morning News*'s coverage of WFAA-TV stifled because of the co-ownership, but also an important media critic for the entire market was lost. If joint corporate ownership of a newspaper and television station can lead to coverage being dropped to maintain positive internal relations, what other types of coverage could be jettisoned to protect corporate interests?

D. MILWAUKEE

Milwaukee has also been described as an example of cross-ownership leading to model behavior. A closer examination reveals anything but model behavior, this time involving a publicly financed sports stadium project. Journal Broadcast Corporation (Journal) operates the Milwaukee *Journal* as well as WTMJ-TV, WTMJ-AM and WKTI-FM in Milwaukee, Wisconsin. All are leaders in their service area. In its comments to the Commission it notes that "the radio and television stations have been totally independent from the newspaper in both program and editorial content," and that the outlets have been critical of each other.[52] At a key moment, on an issue of great public import that directly involved the private interests of the company, that appears not to have been the case.

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[51] Lucia Moses, "TV or not TV? Few Newspapers are Camera Shy, But Sometimes Two Into One Just Doesn't Go," *Editor and Cable*, August 21, 2000, p. 22.
[52] Journal at 2.

There was a move for public financing of a new stadium for the area's major league baseball team, the Brewers. The Journal Group's AM radio station has the contract for broadcasting the Brewers' games. In late 1994, the CEO of the Journal Group, Robert Kahlor, became head of the Milwaukee committee championing public financing for the stadium, and even registered as chief lobbyist. This was a much-debated issue. Indeed, when it came to a vote in the state Senate (in fall 1995) it was decided by one vote. How did the *Journal Sentinel* media cover this big, contentious issue?

"The Journal Company's newspaper, TV-news shows and news-talk radio station all marched in lock-step supporting the public financing position" (Beckman). In the case of the newspaper, that avid support appeared in the paper from the news pages to sports page columnists to the editorials. The other two TV stations, while not such avid boosters, generally reported on the public financing position in positive fashion. Thus, the citizens of Milwaukee, despite the contentious nature of the issue, did not have antagonistic voices in the main media to rely on and the dominant news outlet, the metro paper, had a financial interest in getting the stadium built, which directed the coverage by its captive newspaper. A veteran local media analyst, who had also been a journalism professor for years (David Beckman), noted, "this case is a classic example of how a media monolith defeats the purposes of free and open debate" in the main media people rely on which dominate the public arena and overwhelmingly define the public discourse.

> There's no doubt that conflicts of interest have created some serious lapses in editorial judgment. Milwaukee's Journal Communications, owner of the city's Journal-Sentinel newspaper and WTMJ TV and radio stations faced intense criticism when publisher Robert Kahlor allowed the paper to shed its watchdog role become a cheerleader for a new baseball stadium funded primarily with public money. Not only did Kahlor chair the governor's stadium commission, but also he spent more than $25,000 of Journal company cash lobbying state lawmakers to support public funding.

> No coincidence, say local critics, that WTMJ stations also carry Brewers games. "All four Journal media lost almost all objectivity," says Dave Berkman, retired professor of mass communications and media columnist for the city's alternative weekly, Shepherd-Express.[53]

E. COLUMBUS OHIO

A similar case involved the Dispatch company in Columbus, Ohio, which is controlled by the Wolff family of the area, who owns the *Columbus Dispatch*, the main metro newspaper, WBNS-TV, and WBNS-AM and FM radio stations. A little over ten years ago it also started a chain of suburban weekly newspapers in the region. With all of those papers, they have 78 percent of all print advertising revenue in the metro region, according to CM Media executives. CM Media, which owns the alternative Columbus weekly and a series of suburban weeklies, sued the Dispatch company in the earlier '90s on antitrust grounds, saying Dispatch was establishing the weeklies and holding down ad costs – predatory pricing – in order to keep down CM Media as a significant challenge to their dominance in Columbus media. The Wolff family also owns a bank, an investment company, a printing company, etc.

Another case of a sports team and cross-ownership is telling, with different details this time. The Dispatch's Wolff family is part owners of the Columbus pro hockey team. Besides the usual boosterish coverage of the team connected by ownership to the media outlet that is now too common, there were proposals to build a new hockey stadium. The overt outcome of this was different from in Milwaukee, however. Public financing proposals lost twice in ballot measures. The Wolff family and an insurance company financed the building of the stadium itself. But, since then the city has given land, easements, clean-up, infrastructure and other assistance, subsidized to the tune of "at least $80 million," which the alternative weekly

(*The Other Paper*) has documented, in what coverage they could muster. Had a family that owned the TV station gotten such subsidies in a city with an independently-owned newspaper, the investigative juices of the paper's reporters and editors would have been flowing and front page coverage would have been produced from the one local mass medium that has the resources for in-depth investigation. *The Dispatch* has not, however, covered this huge subsidy. Instead, it has been all boosterism of the team and the stadium. Once again, a case of cross-owned newspaper and TV station failed the local democratic process.

Note also that the Dispatch editorialized in favor of the Telecom Act, saying (7/18/95), "The telecommunications bill passed by the senate ... is a worthwhile effort at getting government out of the way and letting the affected companies freely reshape their industries." The benefit to the Dispatch/Wolff family's TV station was not mentioned.

F. ATLANTA

Atlanta, a city kept in check for decades by a tradition of two competing newspapers, the *Journal* and the *Constitution*, suffered from the merger of the two. With Cox owning a TV station, it is now a large market with a very high level of concentration and cross-ownership. The editorial staffs no longer presented two viewpoints, and the number of state government reporters plummeted from 12 to 3. It soon became clear that there were not enough government reporters as the news was very one-sided. Bad press led to the paper increasing statehouse-reporting time by 6 percent, but the consensus is that the coverage has not recovered to its pre-merger quality.[54]

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[53] Bill McConnel, "The National Acquirers: Whether Better for News or Fatter Profits, Media Companies want in on TV/Newspaper Crossownership," *Broadcasting and Cable*, December 10, 2001.
[54] Roberts, Gene. Leaving Readers Behind, 10.

G. Canada

The best example of a media conglomerate owner using its editorial discretion to enforce a unitary point of view comes from Canada.[55] CanWest, a publisher based in Winnipeg, acquired 136 Canadian newspapers in the summer of 2001. It controls major papers in every major Canadian city outside Toronto and Winnipeg, as well as The *National Post*, one of Canada's two national newspapers.

According to the *Washington Post*, "A CanWest executive said the acquisitions would put CanWest at the head of a 'technological evolution,' leading the way in Canada to 'media convergence' that would break down the boundaries between television, newspapers and the Internet."[56]

The owners of CanWest, the Asper family, announced in December that all 14 of its big-city newspapers would run the same national editorial each week, covering a wide range of topics from the Israeli-Palestinian conflict, military spending, and property rights. This decision, according to journalists all across Canada, goes beyond just editorials, into control over columnists and reporters. Many journalists say the company is breaking age-old traditions that keep reporters and columnists independent of the publications' owners.

> CanWest and its owners, the Asper family, deny that the policy restricts freedom of expression in this way. All they are doing, they say, is exercising the legitimate prerogative of owners to influence a limited part of their publications, the editorials.
>
> … John Miller, director of the newspaper journalism program at Ryerson [University in Toronto], said that CanWest newsrooms have become demoralized. "It is not so much the national editorial, but the fact that everyone has been sent the message they have to watch what they write," Miller said. "If it goes against what is perceived as the Asper line, then some

[55] Brown, DeNeen. *"Canadian Publisher Raises Hackles: Family is Accused of Trying to Restrict Local Newspapers' Autonomy."* Washington Post, Jan. 27, 2002.
[56] *Id*.

> stories aren't going to get written, or some stories will be written and then they will be killed." [57]

Officially, the policy of CanWest is that only unsigned editorials cannot contradict the position taken by the national editorial; in practice, this seems not to be the case. Writers have had their work redacted heavily or eliminated entirely when it contradicts the position enumerated by the Asper family.[58] Stephen Kimber, a journalist that had been writing a column for over 15 years, stated that his column was heavily edited or cut when they contradicted the Asper's position, e.g., on the Israeli-Palestinian conflict.

> "I've had more than one recent column sliced and diced. I can only assume it was done to remove opinions that did not correspond with those of the new owners. They didn't. And I admit I've also done some self-censoring too, steering clear of certain subjects on which I know the owners have taken a stand for me…
>
> This might not be so bad if he Aspers owned one or two newspapers, but they are the dominant player in the newspaper business in Canada today…. In most of the markets in which their newspapers operate, they are the only game in town."[59]

The chilling effect on civic discourse is obvious to many. Furthermore, Kimber states that despite immense local, national and international print and broadcast coverage of these events, no CanWest print or broadcast outlets covered the controversy—with the exception of one piece that defended the Aspers' actions. Five journalists resigned over this matter.

The reaction of ownership to the efforts of journalists to exercise their professional independence should give pause to any concerned about civic discourse, particularly when there are so few media owners.

> "Crucial as free expression and a free press are to journalist," averred a memo from editor-in-chief Peter Stockland and managing editor Raymond Brassard,

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[57] *Id*.
[58] See Kimber at 5.
[59] "CanWest Claims First Victims: Montreal Staff Yanks Web Site; Two Columnists Quit When Censored," *The Newspaper Guild*, January 18, 2002.

> "they do not automatically trump every other right nor does the designation 'journalist' negate the right of the owner of a newspaper company to run the newspaper as he or she wishes consistent with the law."[60]

The dispute in Canada is a bit more explicit than some of the examples in the U.S. (perhaps because cross-ownership has been permitted) but it embodies three of the major themes identified in our initial and reply comments, as Kimber put it:

> CanWest's owners, Winnipeg's Asper family, which made its fortune in the television business, appear to consider their newspapers not only as profit centers and promotional vehicles for their television network, but also as private, personal pulpits form which to express their views.[61]

Above all else, it is less the explicit pressure that comes from an owner that causes trouble for journalists, and more the overt incentive not to criticize one's corporate owner because being too aggressive with an owner can result in termination. One can sometimes nibble lightly the hands that feeds, but biting does not go unpunished. Gannett perhaps puts it best: "With common ownership comes a shared vision of how operations should be conducted in ways that will benefit the entire company."[62]

We do not begrudge the ability of owners to exert this kind of influence on their publications or broadcast stations. It may be an appropriate exercise of the owner's First Amendment rights. However, it is essential that the Commission recognize that, if it relaxes its cross-ownership rules, owners will have both the incentive and ability to control and manipulate the presentation of important news and information in highly concentrated local newspaper and television markets. This is clear from CanWest's own statements:

> In a recent speech . . . CanWest publications committee chairman David Asper borrowed lyrics from the rock group REM: "I can say to our critics and especially to

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[60] *Id.*
[61] Brown, *supra*.
[62] Gannett at 18.

the bleeding hearts of the journalist community that, 'It's the end of the world as they know it…and I feel fine.'"[63]

H. CONTRASTING INDEPENDENT AND CROSS-OWNED COVERAGE OF IMPORTANT POLITICAL ISSUES

Repeated examples of the failure of cross-owned media to exercise their watchdog function stands in sharp contrast to how the independent press, particularly newspapers, can perform. Lest we forget what real journalism is about, we provide contrasting examples, for each of the major categories of abuse above, reporting on politics and covering stadium deals.

1. Covering Political Campaigns in Minnesota

The experience of a recent effort to assess the election campaign in Minnesota adds detail to the importance of preserving the independence of newspapers from TV stations. During election 2000, Alger conducted a content analysis as a component of an ongoing research project with colleagues from the University of Minnesota and Carleton College and partly for the Alliance for Better Campaigns.[64] The content analysis assessed how the 4 Twin Cities TV stations covered election 2000 in Minnesota. The *Star Tribune* of Minneapolis provided resources and had their "media watch" reporter write the story from the data and Alger's assessment of the results.

The study would never have appeared in the leading newspaper in Minnesota if the same company that owned one of the TV stations had owned the paper. Not a word of the study appeared in any of the four TV stations' news shows when it came out. (Three of the four main TV stations are owned by Viacom-CBS, Gannett and Fox-News Corp.)

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[63] *Washington Post*, p. A25, January 27, 2002.

[64] Alliance for Better Campaigns. 2001. "GOUGING DEMOCRACY: How the Television Industry Profiteere on Campaign 2000." (Washington, D.C.)

Indeed, an extraordinary bipartisan coalition of political leaders was in support of the Alliance for Better Campaigns effort in Minnesota. That coalition included from the Democratic side U.S. Sen. Wellstone, two U.S. representatives, the long-time state senate Majority Leader, among others; and from the Republican side the state house Speaker and Majority Leader, the immediate past Governor, among others. It also included the Minnesota Chamber of Commerce *and* the president of AFL-CIO of Minnesota, among other major organizations. But despite this remarkable set of political leaders and organizations, and despite the fact that the national Alliance organization had former presidents Ford and Carter and Walter Cronkite as co-chairs, not a word was heard on any of the four TV stations' newscasts about the press conference that launched the Minnesota Alliance effort in June 2000.

The Alliance, drawing on a Gore Commission recommendation, pressed the TV stations and networks to give to their viewers 5 minutes a night of "candidate-centered discourse" focusing on the candidates' orientations and policy issues, instead of the usual horserace and scandal-chasing. Again, not a word from the TV stations, but it was covered in the newspaper realm by both papers in the Twin Cities, the St. Paul Pioneer Press and the Star Tribune, which are independent of a media corporation with TV interests. Just imagine the likely outcome if the major newspaper in the Twin Cities is allowed to own a broadcast station. Citizens would lose the major news source—other than the local broadcast stations—to cover this important policy issue.

One other element that came to light during the study of the Twin Cities TV news coverage of election 2000 should be mentioned. Our research effort looked at campaign ad watches/critiques. For the entire general election, the total ad watches aired by all four Twin

Cities TV stations on all of their evening news shows (early and late) was eight. This was the case when their own broadcasts were flooded with campaign ads by the dozens, all with their classic distortions, innuendoes, etc. As an Alliance for Better Campaigns study (*Gouging Democracy*) showed, the TV stations took in millions of dollars for those ads and violated the intent of the Lowest Unit Rate rule by jacking up rates. However, they refused to analyze the ads their own stations were sending out to (or at) the public. Meanwhile, in recent elections, the *Star Trib* usually conducted a long series of ad watches. If the *Star Trib* were owned by the same corporation that owned one of the TV stations, it is doubtful that we would have had as many ad watches.

2. Independent Coverage of a Stadium Deal

A very interesting and telling contrast is seen in a very close parallel case on the same issue in the Twin Cities area. For several years, the Twin Cities has wrestled with whether to build the new stadium the Twins were demanding and how much public financing to use. As in Milwaukee, in 2000 a group of civic and business leaders set up a committee to work on ideas for, and to boost, a plan to build a new stadium. And as in the case of the *Milwaukee Journal-Sentinel*, the Publisher of the *Star Tribune* of Minneapolis signed on as a key member of the committee (though not as chief lobbyist).

But when this became known, reporters at the *Star Trib* complained about being put in a conflict of interest position, with the Publisher boosting the stadium committee, while they were supposed to dispassionately cover it as news. Respected columnist Doug Grow went so far as to use his column in the newspaper to chastise the publisher for putting *Star Trib* journalists in such a compromised position. The result? The Publisher resigned from the booster committee and apologized for the journalistic difficulty his stadium committee

participation had created. What a difference it probably made to have a newspaper independent of broadcast properties. (The *Star Trib* had been run by the Cowles family into 1997 and was much respected for its independence and integrity. It was then bought by the McClatchy newspaper chain, which was arguably the chain most respected for its news values. It had and has no broadcast stations.)

3. Covering Enron

Coverage of the Enron debacle is an excellent example of the ways in which media police each other.

On Saturday, January 26, 2001, NBC correspondent Lisa Myers conducted an interview with Linda Lay, the wife of Kenneth Lay, who is now the former CEO and Chairman of the embattled energy trading firm Enron. That interview, and other material gathered for the piece, was shown, in whole or in part, on several of NBC's broadcast and cable outlets over the next several days. Mrs. Lay and others were given the opportunity to praise at length her husband's integrity and describe how the couple was battling personal bankruptcy. Ms. Myers asked questions, including some following up on responses she received from Mrs. Lay.

However, in the days following the interview, questions were raised by media critics, and many former Enron employees, about whether Ms. Myers was too "soft" on Mrs. Lay. In an article in the *New York Times*, Felicity Barringer explored this question, including both criticism of the way the interview was conducted along with more positive comments about how difficult it is to conduct interviews of this type.

> This led some journalists and media critics to ask whether the network and one of its sharp-edged correspondents had become soft.

> Ken Auletta, who covers media companies for the New Yorker, said: "Lisa Myers has proven over the years that she knows how to ask tough questions and be in-your-face aggressive. With this she proved she has another pitch, to draw people out."
>
> He added: "That's commendable. But there's another pitch, a combination of solicitous and tough questions. We didn't see that third pitch" in the interview, he said.
>
> But Richard Wald, a former ABC News executive who is now a professor at the Columbia University Graduate School of Journalism, said aggression was often counterproductive. "What you wanted was a sense of what this woman was like," Mr. Wald said. "I had the feeling she shot herself in the foot."[65]

The *New York Times* and NBC are independent entities with separate ownership.

It is appropriate to question whether self-policing can work to restrain attacks on freedom of expression and diversity of viewpoint in cross-owned entities, particularly in light of the evidence. In a January 18, 2002, column in the *Washington Post*, E.J. Dionne Jr. makes a powerful case for government exercising police powers in those situations where it is clear that the market will fail to do job.[66] Looking at Enron, Dionne asks the pertinent questions that must be addressed prior to allowing the free market to take over from regulators.

> Are markets always self-regulating? No. Is deregulation always the answer? No. Are capitalists always well-behaved and public spirited? No. . . . Can we be indifferent to the undue influence that certain big companies have on our government? No.[67]

Dionne adds, "We put limits on government because we don't want it to dominate our lives. But, in turn, we rely on government to check concentrations of private power.

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[65] The *New York Times*, p. C7, January 30, 2002.
[66] Learning from the Enron Moment, E.J. Dionne Jr., *Washington Post*, p. A25, January 18, 2002.
[67] *Id*.

Americans have always been suspicious of excessive power residing anywhere – in government or in parts of the marketplace."[68]

McChesney and Miller in their attached statement reinforce this observation, noting that this "nation was founded on the idea that centralized control over the press was incompatible with democracy." They go on to caution that "in these particular times, the FCC should be especially concerned about the corruption of its policy making" when the "same large private corporations that aggressively lobby the FCC for relation of media ownership regulations are also among the very larges contributors to the campaigns of candidates for Congress and the Presidency.

I. CONCLUSION

The type of issue that brings the question about local cross-ownership in highest relief is how the newspaper in such a cross-ownership scheme covers major issues affecting their broadcast partners; this is the true test of whether the "natural" "institutional diversity" of the newspaper vs. a TV station is altered by cross-media ownership. In light of the "convergence" efforts in news operations, in light of the Snider and Page findings on editorial orientations regarding policy decisions of vital public importance effecting broadcasters, and in light of the biased level and nature of attention given to broadcast partners, the problem with such cross-ownership should be evident; the violation of the "diverse and antagonistic" principle should be clear.

From the main media people continue to rely on, what alternative perspective on the Telecom Act, duopoly issue, and current policy question of local cross-ownership, has the

[68] Dionne, after quoting James Madison in Federalist Papers No. 51 – "If men were angels, no government would be necessary" – goes on to say "As Madison might have put it, if capitalists were angels, we could deregulate everything. But capitalists are no more angelic than anyone else." *Id*.

public received in the Fargo-Moorhead media market/area and other grand fathered cross-ownership areas? With this rule rescinded, what will they get in other areas from the main media to which people look for news, information and opinion?

VII. CONVERGENCE, CONCENTRATION AND THE EROSION OF JOURNALISTIC VALUES

A. DIFFERENT MEDIA HAVE DIFFERENT PROFESSIONAL APPROACHES, WORK ETHICS AND STANDARDS

Ironically, what should be a rich layering of diverse approaches brought to bear on important public policy issues with the purpose of providing a rich civic discourse becomes a problem to be eliminated in the minds of those who are pushing cross-ownership. Tampa again provides a case in point. As a key player in the most vigorous effort to create convergence put it "The single greatest challenge we have is to overcome our [work] cultural differences" Bradley [WFLA News Director].[69]

Those pushing convergence from the newspaper side are even more adamant about ridding the operation of the journalistic ethic.

> "An ongoing concern is how to integrate the entrepreneur into a traditional culture," Thelen [the Tampa Tribune's executive editor and vice chairman] says. "This will be a challenge for the company to adjust to. We want to place a high value on experimental risk taking, rather than on the tried and true journalism story.[70]

The differences between the media are fundamental. Reporters caught in the convergence frenzy clearly bristle under the heavy-handed efforts to merge the media.

> But Kathleen Gallagher, a Milwaukee Journal Sentinel investment writer, who often does live 45-second interviews from the newsroom, finds the TV piece

[69] Al Tomplins and Aly Colon, "NAB 200: The Convergence Marketplace", *Broadcast and Cable*` April 10, 2000, p. 48.
[70] Aly Colon, "the Multimedia Newsroom," *CJR,*, June 2000, p. 26.

"disconcerting." [TV anchors] spend all this time thin king about their product and how they present themselves, and you're interrupting the writing of your story to do [the interview] quickly.[71]

"The last newspaper story I wrote, I wrote on my own time," says veteran WFLA reporter Lance Williams. "But the fun part of it is there are no restrictions on my story. It is hard to write a minute and thirty-second story. But writing for the newspaper is freeing.

"My brain was mush by the end," says Barron, who normally runs WFLA's Sarasota bureau. "There were times when I sat down to write a script for TV and would start putting in attribution like it was a newspaper story."[72]

With a 110-daily-circulation lead over the competition, Brown says the *Times* still beats the *Tribune* with basic, hard-core journalism. "I think [convergence] creates a serious distraction, potentially, in how they cover the news," he says. "There is a risk of dilution."[73]

However, whatever happens, the Tampa convergence experience raises at least two concerns. If journalists spend time contributing to each other's media, when will they have to gather the news? And more important, will similar media convergence mean that fewer voices produce the news or perhaps, some voices will be lost.[74]

B. AN EXAMPLE OF EROSION OF VALUES

Fargo (N.D.)-Moorhead (Minn.) metro area – 211th-ranked radio market, SMSA of 174,000 (2000 census). This small market is overwhelmingly dominated by two media corporations: the locally-based Forum Communications company, which owns the metro newspaper, *The Forum*, WDAY-TV (ABC affil.), with the leading TV news show in the area, and WDAY-AM radio station. The leviathan of radio, Clear Channel, controls six of the other area radio stations.[75]

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[71] Rabasca, p. 2.
[72] Strupp, p. 21.
[73] Strupp, p. 22.
[74] Tompkins and Colon, p. 53.
[75] The Forum cross-ownership case is not included on the informal lists of newspaper-broadcast cross-ownership kept by FCC staffers. Those lists also do not include the Gannett newspaper-TV cross-ownership in Phoenix, which resulted from Gannett's control of KPNX-TV and their purchase of Central Newspapers, including the *Arizona Republic*, in the second half of 2000.

Alger served from the mid-1980s through the early 1990s as political analyst for WDAY-TV. This analyst also wrote periodic guest opinion columns for the newspaper and interacted in various ways with editors and reporters there. He monitored *The Forum* through most of 1996 for an election research project and he has kept in contact with associates in the area since.

When Alger served as on-air analyst for WDAY-TV news in the late '80s and early '90s, the strong rule was to keep *The Forum* at arms length from the TV station and to never use resources in common. The news director was emphatic about the need to have nothing to do with *The Forum* "because we need to keep our operations entirely separate – and we don't want any trouble with the FCC...." Indeed, before the 1992 elections, the WDAY news director asked Alger if he could and would set up a separate polling operation for WDAY even though its co-owned newspaper already had in place a regular polling operation it worked with for public opinion samplings.

But revealingly, after the '96 Telecom Act was passed, with its easing of ownership restrictions and general deregulatory moves, a new pattern of collaboration between the hitherto emphatically separated news operations commenced. As a veteran reporter from the paper, who has spent time elsewhere as well, pointed out, the new managing editor for *The Forum* has the explicit, main charge to "facilitate convergence between the Forum and WDAY news operations." And further, the veteran journalist, who has also taught college journalism, reports that when broadcast matters are dealt with in the paper, WDAY is given decidedly disproportionate and favorable attention. Additionally, on the second page of the newspaper there are extensive plugs for what appears that evening on WDAY-TV. WDAY does similar things for the paper, with substantial cross-promotion of its own.

The Web site for *The Forum* is now a common web site for the paper, WDAY-TV, and WDAY radio (www.in-forum.com). There is much more sharing and melding of reporting duties. These are not separate "voices" in the local media area. The case of the TV-newspaper combination in the Tampa area has obviously carried that trend even further, with its single news building and combined operations, and Media General plans to do the same in the other areas in which it has cross-ownership. The pattern of common Web sites and increasingly shared reporting efforts is now common in cross-ownership cases around the nation. This case from the Fargo-Moorhead area also demonstrates how the Telecom Act and subsequent FCC actions have sent a signal that all restraints are off and there is no need to maintain even a semblance of editorially separate voices in these distinct media organizations that are under the same corporate control. Given all that and the six radio stations owned by Clear Channel, the citizens of Fargo-Moorhead are the poorer for this further attenuation of "diverse and antagonistic sources" of news and opinion. This problem is much greater in most markets when the newspaper is allowed to own a broadcast TV station.

C. ECONOMIC PRESSURES CREATED BY MERGERS UNDERMINES JOURNALISTIC PROFESSIONALISM

Newspaper-Broadcast cross-ownership must also be viewed from the perspective of merger policy. If the cross-ownership rule is rescinded and the overwhelming pattern of deregulation seen after the Telecom Act continues, as is highly likely, then we will indeed see another spurt of mergers, this time of local newspaper-with local TV stations. Friedland outlines several processes that have starved local news reporting of resources and cautions that

> To allow further linkages between these two, already powerful movements towards concentration would further damage the already fragile environments of local news.
>
> What would be the almost certain, immediate effect of allowing newspaper-television cross ownership? The most obvious effect would be a constriction of the supply of local news and a concomitant restriction in the supply of local news sources.

While the general impact of triggering a merger trend will have negative impacts on journalistic values, it is important to note that there are ways in which combinations pose special threats to the preservation of journalistic principles. While mergers tend to starve the journalistic values of the enterprise of resources, in the drive to produce profits for the merged entity, the multitasking[76] and cross selling[77] that typifies combination mergers poses a special threat. It is intended specifically to homogenize the media.

Moreover, because professional lines are breached, it is quite problematic to define activities and preserve professional ethics.

> The alliance between the *Chicago Tribune* and Tribune-owned WGN channel 9 led the American Federation of Television and Radio Artists (AFTRA) to file a grievance against the station after a WGN reporter (an AFTRA member) was asked to write for the newspaper without additional compensation. "I think that with the consolidation of the media, it's a real danger," says Eileen Willenborg, executive director of AFTRA's Chicago chapter. She raises another issue as well. 'You can't spread professionals so thin and still have a professional product." *Tribune* executive declined comment.[78]
>
> As staff began to work more closely, they discovered a disparity in the pay levels between television reporters and newspaper reporters. Religion writer Bearden used to get extra pay for filing TV stories in addition to her newspaper stories. With convergence, the extra pay will dry up. *Tribune* managers say they know they will have to address the pay issue if newspaper staffers routinely appear on television.

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[76] Rabasca, p. 4.
[77] Rabasca, p. 4, Tompkins and Colon, p. 50, Bill Mitchell, "Media Collaborations," *Broadcast and Cable*, April 10, 2000.
[78] Moses, p. 23.

> And then three is the issue of workload. Reporters and photojournalists worry the marriage will mean more work without more money.[79]
>
> Along with concerns about journalistic quality and time management comes the question of compensation of reporters who perform crossover work, as well as redefining job descriptions and hiring rules for incoming reporters. So far, no staffers have received extra pay for going beyond their regular workload, and many say they would like to see the issue settled before convergence becomes more routine.[80]

These pressures and problems emerge in all mergers. They are heightened because the "fear is that corporate bean counters see convergence simply as a way to 'thin the herd' of reporters rather than using the huge reporting teams fielded by papers to greatly broaden the scope of broadcast stories."[81]

Several lines of pressure are augmented by these mergers. The typical pattern in these media mergers, especially when the very valuable major metro newspapers and VHF TV stations are involved, is that the media "properties" are hugely expensive. After the buyout, the corporation is saddled with big debt - or even bigger debt, in many cases. These also tend to be publicly held companies, with the increasing Wall Street demands for ever-rising profit margins. These big financial weights have regularly led to reductions in news personnel and other resources for news and opinion.

These patterns are well documented in *Megamedia*; see chapters 5 & 6 on the debt factor, profit demands and impact on news function. A recent study sponsored by The Project for Excellence in Journalism and the *Columbia Journalism Review* (*Columbia Journalism Review* Special Report, 2001) found TV news operations across America under such

[79] Tompkins and Colon, p. 50.
[80] Strupp, p. 22.
[81] McConnel, The National Acquirers.

pressures.[82] The routine result is that budgets are cut or drastically slashed, journalism capacities are lessened, and First Amendment responsibilities are less and less adequately met: "To meet profit demands, many news directors report they are having to produce a thinner and cheaper product by adding news programs while cutting their budgets" (p.1).

A few examples, focusing on newspapers that have already participated in combinations or are pressing hard for removal of the ban on cross-ownership. In other words, these newspapers have already exhibited the behaviors of concern that are likely to be reinforced by mergers involving combinations of newspapers and TVs.

The first set of examples involves incidents of voice slashing, where the number of papers, or the number of people who run papers, is diminished. Some of these mergers mean a small town gets its number of speakers reduced, normally leading to poorer coverage of local news and less community-specific information. As in the case of CanWest discussed above, other mergers simply put more papers under the umbrella of a giant, which, essentially, puts the same speaker in different cities or towns, stripping each city's voice of its individuality and endangering the integrity of coverage.

The most direct expression of a squeeze on resources is the loss of jobs or the lowering of salaries as a result of a newspaper taking on new ownership (usually by a newspaper giant). Most of these job cuts lead directly to less coverage or a coverage shift, one that generally does not favor the local readership and often aims for more "soft" news. [83]

Media giants like Gannett Co., [84] Times Mirror Co., [85] and Knight-Ridder[86] that are pushing hard for cross-ownership would find another vehicle to consolidate dailies and

[82] "Gambling with the Future: Local Newsrooms Beset by Sponsor Interference, Budget Cuts, Layofffs, and Added Programming," *Columbia Journalism Review*, November/December 2001.
[83] Roberts, Gene. Leaving Readers Behind, 8.
[84] Roberts, Gene. Leaving Readers Behind, 5.

weeklies and slashing staffs and pages. In the interest of monopolizing a region or cutting costs, the newspaper Goliaths ignore the needs of the local people – intense, focused coverage of local schools, community activities, and community concerns such as crime and local development.

Another set of examples deals with instances of newspapers favoring, or being swayed by, advertising or political interests.[87] Whether it is curbing negative coverage of a local politician in order for him to let a local newspaper merger go through, or not reporting bad behavior by a local bank because they are a major advertiser in a newspaper, it all threatens the integrity of the coverage. Surveys by the Columbia Journalism Review[88] and the Pew Research Center found disturbingly deepening trends towards sponsor interference and journalistic self-censorship in TV news shows and, in the case of the Pew Research survey, in newspapers as well. Given the above evidence, it is highly likely that more local broadcast-newspaper combos will worsen this danger to the news contribution to the dialogue of democracy.

While the phenomenon is most prevalent in smaller markets, it also afflicts some of the largest newspapers, including *USA Today,* [89] *The Washington Post*[90] and the *New York Times.* [91] In order to maintain advertiser relationships, coverage had to be undermined.

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[85] Roberts, Gene. Leaving Readers Behind, 9; Rowse, Arthur E. Drive-By Journalism, 24-25.
[86] Bass, Jack. Leaving Readers Behind, 113, 116.
[87] *Columbia Journalism Review*. 2001. "Special Report: Local TV News: Gambling With the Future - Local newsrooms beset by sponsor interference, budget cuts, layoffs...," November/December issue. See especially, "Thinner, Cheaper, Longer - To pad profits, broadcasters cut budgets and staff while adding programming," pp.12-13.
[88] Kohut, Andrew. 2000. "Self-Censorship: Counting the Ways," Columbia Journalism Review, May/June, pp.42-43.
[89] Rowse, Arthur E. Drive-By Journalism, 163

> *USA Today* goes one step farther, offering to redo its front page for any advertiser who is willing to pay top dollar. The page remains similar to a normal *USA Today* front page but is complete with stories promoting whatever firm is in question. The revised edition is then circulated as a promotional piece.

These instances make it seem as though advertisers have as much say about what is being reported as the reporters do. This is certainly not a healthy journalistic environment.

D. HOPES THAT ALTERNATIVE MEDIA WILL PROVIDE ANTAGONISM ARE DIM AT BEST

The Commission places considerable emphasis on the existence of two alternative media as a check on the concentration of the major mass media, weeklies and the Internet. Neither of these provides alternative voices that can balance out the major mass media.

The Commission cites the Internet as opening great vistas of diversity and other "voices" for local areas. While we all hope the Internet will, in reality, not just in expectation or wishful thinking, serve as a truly diverse source for the general public, there are problems with that notion as things stand. "Doing the math" as Geller points out leads to the conclusion that 'pragmatically viewed, there has been no change that would warrant abandoning the rule… My point here is that as to local issues, there is not present or near-term development that, pragmatically viewed, makes any difference.

> Take any "hot" local issue… Where would people have received information or views concerning that issue in 1975?..
>
> If the issue arose today, what would be different? The scores or hundreds of national cable and DBS channels would not help (one cable outlet, NewsChannel 8, does present local news, but it is owned by Channel 7 and in any event has a miniscule audience rating compared to those of the four over-the-air VHF channels; similarly, the PEG channels, while local, have

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[90]According to Rowse, Arthur E. Drive-By Journalism, 49, in 1994, *The Washington Post* ran a huge story urging the approval of GATT without admitting that it was a subsidiary of American Personnel Communications and stood to profit $1.3 billion if it went through. Similarly, p. 159, , the *Post* runs ads for the Nuclear Energy Institute, a large supplier of advertising revenue, and neglected to run a story about a report by Public Citizen which said 90 percent of nuclear reactors had been operating in violation of government safety rules

[91] According to Street, John. Mass Media, Politics, and Democracy, 141, "*The New York Times* changed an article about Tiffany's, a huge advertiser, and accompanied it by a bland editorial, to avoid damaging their relationship with the company. Similarly, Rowse, Arthur E. Drive-By Journalism, 162, notes that Chrysler, an enormous source of ad revenue for whomever it deals with, demands to see the content in the pages accompanying its ads to ensure that it is 'positive' and 'light.'

> negligible audience penetration). These are some new TV UHF channels like 20 or 50 but they do little if any news or public affairs programming. Digital TV or digital multicasting is nowhere, and that will be the case for years to come. Reliance by people on the Internet for discussion of the issue would be close to nil in audience penetration terms. People would very largely get news or vies about the local issue… from the same sources as in 1975… The Commission must take into account the pragmatics of the situation – what media or signals address local issues and even then the penetration or audience ratings of the media outlets as to local issues.
>
> When that is done, it will, I submit, come to the same conclusion as Chairman Burch did in 1970 -- that these two powerful media, the daily newspaper and the VHF stations with extensive newscasts, dominate the local informational scene and therefore should be in different ownership hands so as to diversify the sources of information coming to the people on local news and views.

1. The Internet

Our central concern – the reason for the First Amendment – is for the mass media's service as accessible sources of news, information and exchange of opinion about public affairs. Friedlander points out that the Internet is a long way from providing that function.

> The Internet offers no substitute for local news. Local Internet content is largely generated by databases that can be automatically formatted into information about local entertainment, yellow pages, classifieds, and so on. Where there is local news content it is almost invariably offered by a local newspaper, or less often, television news station. For the Commission to say that the Internet provides a robust alternative to local news is untenable. Independent, self-sustaining, Internet based news operations in the United States are exceedingly rare, are virtually all in niche markets (e.g. business news), and are confined to the nations' largest cities. Solid, verified, comparative research in this area is extraordinarily thin. There is no justification for deciding that the Internet provides a satisfactory local news alternative in the absence of any evidence.

First, we are still a long way from universal or even substantial majority access to, and serious use of, the Internet. Second, the surveys show most Internet use is for e-commerce, sports, celebrity and other entertainment material, as well as other personal interests. Third, just a few months ago, Media Metrix found that the top ten Web sites for genuine public affairs and other news were Web sites of the same major Megamedia corporations (plus the

NY Times and *Washington Post*) that dominate throughout the rest of the media; these were, from top to bottom, MSNBC.com, CNN.com, NYTimes.com, ABCnews.com, USAToday/Gannett.com, etc. This is really not surprising since those media companies are abundantly cross-promoting their Web sites on their original TV and print outlets.

Additionally, "[m]ost visitors to Web news sites check in only two to four times a month," unless there is a big event like the terrorist attacks. Andrew Kohut of the Pew Research Center surveys reports that "much of the traffic at news Web sites is episodic or serendipitous." Even at the NYTimes.com site, the average time spent at the site was only 8.2 minutes. As Merril Brown, editor of MSNBC.com said, the evidence shows the leaders, like those just cited, are "solidifying" and "extraneous sites or weak local sites where there's a lessening of investment are weeding themselves out."[92] Fourth, there is little evidence that *local* Web sites are significant contributors to news, information and opinion of local significance in terms of general public use. The common uses of local Web sites are for information on dining and entertainment availability and timing, sports, weather and the like. What use there is for public affairs news and information is mostly focused on the sites of the existing print, TV and radio sources. The Internet then, is not a major substitute for the main metro newspaper, local TV news shows, or news and talk radio stations; it is rather a reinforcement.

2. Weekly Newspapers

The Commission, in the NPRM, also pins hopes on the increased number of weekly newspapers. Unfortunately, however, readers primarily seek out the big city weekly for the entertainment listings and the dating services. Many of these papers began life in the 1960s

[92] Barringer, Felicity. 2001. "Growing Audience is Turning to Established News Media Online," *New York Times*, August 27, pp. C1, 6.

and 1970s as "alternative weeklies," with a very different orientation from the mainstream newspapers. Some provided excellent alternative voices and sometimes sharply prodded the metro daily or caught it napping on an issue. This tradition persists, but it is a faint voice in the industry. There are some that are striving to provide an alternative perspective and a different, even antagonistic, voice in civic discourse. Unfortunately, they do not have the means to be full competitors with the metro dailies.

In the 1990s, there was also a major consolidation trend in this media area, which resulted in many of the "alt weeklies" not being particularly alternative anymore (as Alger systematically documented regarding the Twin Cities weekly).[93] Some do offer a bit of another voice, but they are only able to provide very selective looks at a few subject areas when they tackle a public issue at all. The weeklies that cover parts of metro areas simply do not have the resources to be significant news and opinion sources. These weeklies are no serious counter to the main local media (other than on a few occasions catching the local TV news show or metro newspaper off guard or offering an isolated critique of local TV news antics).

E. CONCLUSION

It seems that the world of media ownership has now morphed fully into a power charade, with newspaper Goliaths buying more papers simply because they can, not because they can make them better. Why improve a newspaper when disabling competition affords you the luxury of a poor product? In light of the mishandling of what can now be considered most of the nations newspapers, it seems misguided to allow these same near-villains to take the reins of the broadcast news outfits as well. While cross-ownership has just begun to rear

its ugly head, the negative effects it will have on what we have established as an already sullied journalism world are quite clear. Media General moving its Tampa, Florida newspaper into the same building as its television station and its online operation in order to share stories is a clear voice-slashing practice. The Tribune-owned *Hartford Courant* has begun its partnership with the Tribune-owned WTIC-TV in the same city, effectively combining what may be the two loudest voices in the city, and possibly the state. This is a trend, and a powerful one at that, that will lead to a very small number of people controlling what tens of millions of people hear, read and watch daily.

McChesney and Miller in their attached statement emphasize the point made in our initial comments that, in the case of TV these are not "naturally 'free markets' enterprises, in which the government may or may not intervene… these markets could not exist without government licensing of monopoly rights to spectrum." Since the underlying issue here is a "a core liberal and democratic value," they point out that "the presumption of the FCC should not be the presumption of the large media firms that whatever makes them most profitable is, *ipso facto,* what is best for the American people." To the contrary, they argue, "[w]hen in doubt, there should be a very substantial bias toward multiplicity in media rather than concentration.

We have already sat by as media imperialism has washed away hard-nosed local coverage, as the needs of <u>the people</u> have been neglected in favor of big business maneuvering, and as journalism as a trade has been diluted to the point of near tastelessness. Allowing broadcast news to rest under this dark cloud will take us one step closer to erasing what the Supreme Court, over 50 years ago, declared was imperative to the integrity of the

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[93] Alger, Dean. 1999. "CITY PAGES: Has the Last Twin Cities' Alternative Newspaper Gone Mainstream?," *Minnesota Law & Politics*, August.

First Amendment and the "welfare of the public" – assuring the "widest possible dissemination of information from diverse and antagonistic sources." If we are not careful, there will soon be one voice; shortly thereafter, one newspaper, and, if the attitudes of owners like those of CanWest prevail, one idea.

PART IV:

LEGAL ISSUES

VIII. INDUSTRY COMMENTERS MIS-APPLY ADMINISTRATIVE LAW STANDARDS OF REVIEW

Several industry commenters state that the burden is on the Commission to justify maintaining the cross-ownership rule.[94] Indeed, some attempt to support their position by quoting back to the Commission its own words[95] from the time the rule was adopted – the Commission is "obliged to give recognition to the changes which have taken place and see to it that its rules adequately reflect the situation as it is, not was."[96] This is true, and as shown in these comments, the present state of the media industry fully supports retention of the rule. The industry commenters have ignored present reality in favor of arguments from 5 or 10 years ago. Whatever validity those arguments had then, they are without merit now. As Henry Geller explains in his attached statement, "in short, it is arbitrary if the Commission simply relies upon an explosion of new media, without looking to see if the media in question actually address local issues and if so, whether their reach and audience penetration is of such significance as to challenge the dominance of the above noted two forces."

The industry comments evidence a misunderstanding of the burden of proof applicable to this proceeding. As CU *et al.* explained in our comments, the Commission's obligations

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[94] *See, e.g.,* Media General at 59, quoting Chairman Powell, "I start with the proposition that the rules are no longer necessary and demand that the Commission justify their continued validity," *1998 Biennial Regulatory Review*, 15 FCC Rcd at 11151; Gannett at 23, quoting Opening Statement of Federal Communications Commission Chairman Michael K. Powell Before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce, March 29, 2001 (the FCC must "validate the purpose of the rule in a modern context or eliminate it").

[95] *See, e.g.,* Hearst-Argyle at 3; Gannett at 21.

[96] *Second Report and Order* at paragraph 100.

are governed by the standard set forth by the Supreme Court in *State Farm.* [97] "An agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[98]

A. IF THE COMMISSION ADOPTS THE APA PRINCIPLES ARTICULATED BY INDUSTRY COMMENTERS, THE COMMISSION MUST EVALUATE AND VALIDATE RECENT DEREGULATORY CHANGES AND SHOULD DO SO BEFORE ACTING FURTHER

The industry commenters cite extensive D.C. Circuit precedent directing the FCC to evaluate the effectiveness of its policies.[99] This precedent, however, is limited in two important ways. First, empirical proof is not required, especially when evaluating rules such as the newspaper/broadcast cross-ownership rule (NBCO) designed to foster the First Amendment. As *Bechtel II* states "the Commission may believe that the goals Congress has directed it to pursue [via the public interest standard] are in the end completely unmeasurable. Especially given the strictures of the First Amendment, that may be so." 10 F.3d 875 at 881 (D.C. Cir 1993) (citing *Red Lion*). Second, to the extent that the Commission offers justifications susceptible to empirical proof, we caution the Commission that the duty highlighted in the *Bechtel* cases is *not* a directive in favor of ever-decreasing regulation. Nothing in the extensive line of cases cited by the industry on this point limits it to retention of existing rules. Thus, if the FCC does have a duty to reevaluate the success of each of its

[97] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* 463 U.S. 29, 103 S.Ct. 2856 (1983) ("*State Farm*").
[98] *Id.*, 463 U.S. at 41-42, 103 S.Ct. at 2866.
[99] *See, e.g.,* Cox 1998 comments at 3, Media General at 64-66, NAB at 15-18, NAA at 92-99. Cases cited for this proposition include: *Bechtel II*, 10 F.3d 875 (D.C. Cir 1993); *Bechtel I*, 957 F.2d 873, 881 (D.C. Cir. 1992); *ACLU v. FCC*, 823 F.2d 1554 (DC Cir 1987); *Quincy Cable TV v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985), *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979); *HBO v. FCC*, 567 F.2d 9, 36 (DC Cir 1977).

rules under the APA, this duty does not favor one ideological position, the Commission must equally reevaluate some of its recent deregulatory actions.

Moreover, evaluation of a recent repeal is probably more urgent than reevaluation of long-standing decisions because of the legal imprimatur given to existing regulation. To avoid capriciousness, if the Commission seeks to apply this standard to the NBCO rule, it must likewise produce evidence that its deregulatory action has been effective at producing the improvements in diversity and competition it predicts.

B. THE APA'S STANDARDS WEIGH HEAVILY AGAINST ALTERING THE RULE IN THE ABSENCE OF EVIDENCE UNDERMINING IT

Commenters NAA and Cox cite *RTNDA v. FCC*[100] in support of its conclusion that the Commission bears a burden of proof in this proceeding. NAA at 116, Cox at 5. *RTNDA* does not support the industry's claim. *RTNDA* holds that "settled agency rules are entitled to a presumption of validity such that failure to repeal them has some inherent justification; otherwise, regulatory schemes would be dangerously unstable." [101]

RTNDA does not stand for the proposition that the NBCO rule must be repealed unless the Commission can resupport its rule. In *RTNDA* the D.C. Circuit considered the FCC's decision not to repeal the personal attack and political editorial rules even though it had stopped enforcing the Fairness Doctrine and the original justification for both the Fairness Doctrine and the rules were closely linked. Although in *RTNDA* the court disagreed with the FCC's contention that the petitioners opposing the rules bore the burden of explaining why they should be removed, *Id.* at 881, *RTNDA* does not govern the present instance because it was a special and unusual case, carefully limited by the court. The D.C. Circuit clearly stated

[100] *RTNDA v. FCC*, 184 F.3d 872 (D.C. Cir. 1999).

that it was the FCC's action in adopting and NPRM "premised on the conclusion that the rules may not be in the public interest." *Id.* at 881. The court explained that normally the agency could rely on the original reasons it adopted a rule, but in *RTNDA*, the "original rationale for the challenged rules ... has been abrogated..." Id. at 885.[102] This is not the case here. The NBCO has been thoroughly supported and endorsed by the Commission several times in the last 5 years.

Moreover, the *RTNDA* case shows that even in the most extreme circumstances, after almost 20 years of delay and, in the court's view, insufficient reasoning, existing FCC rules should not be repealed if at all possible. Thus, although the court was clearly frustrated with the delay and lack of action by the Commission it concluded, "because the rules have been in force for more than thirty years, the more prudent course is to leave the present regulatory regime in effect and order the FCC to provide a more detailed defense …." *Id.* at 888.

Similarly, the industry cites *TRAC v. FCC* in support of its views. But *TRAC* upholds State Farm. "To the extent that the Commission's [decision] amounts to a change in its view of what the public interest requires .... [it] has an obligation to acknowledge and justify that change in order to satisfy the demands of reasoned decision making." 801 F.2d 501, 518 (DC Cir 1986).

C. THE BIENNIAL REVIEW PROVISIONS DO NOT CHANGE THE STANDARD OF REVIEW

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[101] *Id.* at 880 (citing *State Farm*.)

[102] The industry argues that the NBCO is similar to the rules at issue in RTNDA because the FCC's one to a market rule has been eased, and that rule is similar in some ways to the NBCO. The analogy is inapposite. Although free-standing from the Fairness Doctrine, the personal attack and political editorial rules were much more closely linked to it than the various rules cited by the industry as evidence that support for the NBCO has eroded. For example, the television one to a market rule, while similar in some ways to the NBCO rule, is not rooted in the NBCO rule in the same matter that the personal attack and political editorial rules were rooted in the Fairness Doctrine. The one to a market rule was not cited when the Commission adopted the NBCO.

The industry argues that, regardless of the established precedent in administrative law, the biennial review provisions of the 1996 Act increase the Commission's burden in justifying this rule. *See, e.g.,* NAA at 90, Morris at 2, Cox at 8, Media General at 58. Nowhere in the statutory text or legislative history does 202(h) evidence an intent to overturn the Supreme Court's interpretation of the APA as articulated in *State Farm*. Supreme Court and D.C. Circuit precedent teaches that, absent express intent to overturn established precedent, Congress should not be presumed to have reversed it. *See, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989);[103] *National Treasury Employees Union v. United States Merit Systems Protection Board*, 743 F.2d 895, 913 (D.C. Cir. 1984) (it has become a "contemporary precept that Congress legislates on the basis of policies and principles it has followed in the past, and unless Congress makes an express statement in the legislative history that it has abandoned long-standing precedent, the court will presume its retention.") (citation omitted).

Moreover, the legislative history supports a conclusion that preserving localism remains an important part of the Commission's mandate. The Senate Report stresses the importance of "localism concerns." S. Rep. No. 104-23 (1995) at 69 (additional views of Senator Hollings). Similarly, the House Report emphasized that the statute is intended to serve the goals of "competition and diversity," while "maintaining several independent voices in each local market." H.R. Rep. No. 104-204 (1995) at 118-119; *see also* 141 Cong. Rec. S8460-01,S8463 Thursday, June 15, 1995 (statement of Sen. Dorgan in support of a biennial review provision); 141 Cong. Rec. S8206-02, S8213-15, Tuesday, June 13, 1995 (statement of Sen. Kerrey).

[103] Apropos of the holding, the statutory interpretation in *Patterson* was legislatively overruled in the Civil Rights Act of 1991, but the procedural holding stands firm. *See Steinle v. Boeing Co.,* 785 F.Supp. 1434, 1436

The industry argues that the burden of proof is reversed and placed upon the proponents of regulation. But in fact, when Congress intended to reverse a burden of persuasion under the public interest standard, it knew how to do so explicitly. Section 7 of the Act, 47 U.S.C. § 157, establishes the policy of the United States to encourage the provision on new technologies and services to the public. It states, "[a]ny person or party ... who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest." 47 U.S.C. § 157(a). Congress made no such explicit decision under Section 202(h), and none can be inferred from its silence on the matter.

NAA argues that the term "necessary" in 202(h) requires that a rule may not merely be "useful" to promote the public interest, but it must be required or indispensable to the public interest. NAA at 87-89. NAA's argument proves too much. Under NAA's analysis, up until the 1996 Act, regulations could be adopted if they were *not* necessary to promote the public interest. Such an interpretation would be absurd. The FCC's authority to regulate in the public interest has never been construed to be a loose and optional standard. The Commission has always been vested in its obligation to adopt rules and regulation necessary for the public interest. Under Section 307(a), the Commission is required to grant a license "if the public convenience, interest, or necessity *will* be served thereby..." 47 U.S.C. § 307(a) (emphasis added). The use of the term "will" and the term "necessary" both include a mandatory element. Thus, while the biennial review is new, the necessity that a regulation serves the public interest is not.

In *Iowa Utilities*, cited by NAA in support of its contention, the Supreme Court analyzed the term "necessary" in Section 251(d)(2) of the Act. It concluded the term

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(1992).

"necessary" required the FCC to adopt, "some limiting standard, *rationally related* to the goals of the Act …." *Iowa Utilities*, 525 U.S. 366 at 388 (1999) (original emphasis omitted, emphasis added). Certainly, the FCC, in this case also, but it is judged under a rational basis standard and is by no means limited to the content NAA prescribes for it. Finally, NAA's argument ignores the fact that the word "necessary" in 202(h) modifies "public interest." As CU et al. explained in its initial comments, by incorporating the term "public interest" Congress incorporated the long history and meaning of the public interest and the FCC's discretion to implement it.

IX. THE INDUSTRY HAS NOT MET ITS BURDEN OF PROOF, THE EVIDENCE PROFFERED SUFFERS SIGNIFICANT FLAWS

A. THE MAJORITY OF THE INDUSTRY'S RECORD IN SUPPORT IS ANECDOTAL AND THE INDUSTRY'S VOICE COUNT AND MARKET ANALYSIS IS FLAWED.

The industry is unable to meet its burden under the APA and *State Farm*. Industry comments insist that diversity is enhanced through consolidated operations and that this supports repeal of the rule. As demonstrated in CU et al.'s comments, elsewhere in these reply comments, and in the reply comments submitted by UCC, et al., they offer little in terms of hard data, and volumes of self-serving anecdotes.[104] The industry's comments do not provide a sound basis for Commission action. First, these are self-interested self-descriptions that have no more rigor than a press release. Second, many of the supposed benefits are activities that should either be done as a matter of course by broadcasters subject to a public interest obligation. For example, in many cases, broadcasters touted their coverage of the September 11th tragedies in support of their good work. This coverage was indeed essential

[104] *See, e.g,* Tribune at 43-45; Belo at 4-6; Comments of Cox Enterprises, Inc. at 12-13; Gannett at 5-10, Media General at 9-10.

and of high quality. But *it is fulfillment of a statutory duty*. Third, some of the examples do more to illustrate a weak commitment, rather than a strong one, to community service. In just one example, Gannett heralds its Perfect School initiative, which culminated in a TV broadcast at *8 am on Sunday morning*, hardly a time when many community members are watching television, Gannett, Appendix A at 7.

Fourth, this type of evidence, in the context of this proceeding, is inherently biased. The negative impact of the NBCO's repeal will be in the stories not covered and the viewpoints not heard. Proving a non-event is difficult enough through anecdote, but this difficulty is compounded by the fact that the individuals likely to be aware of the non-events work for corporations who do not want those facts known. Thus, producing anecdotes on one side of the policy question is much easier than on the other. The Commission cannot blind itself to this reality and base its decision on self-serving industry statements that it knows cannot be refuted.

It is important to note that CU *et al.* do not question the probity of anecdotal evidence all together. In fact, despite the difficulty of finding proof through counter-anecdote, CU *et al.* provide similar evidence below of the flaws in allowing cross-ownership. Anecdotal evidence on its own, without empirical evidence and theoretical models underpinning it, is of little value. CU *et al.* provide our examples as the top layer on a strong theoretical and empirical foundation. The industry's studies and models, however, do not withstand careful review.

Because anecdotal evidence is extremely unreliable and, in this case, inherently biased, the Commission must look to empirical data. The empirical data referenced by the industry, however, is severely wanting. As showed later in these reply comments and in the

UCC, *et al.* reply comments, a number of parties supplied data about their own media markets, but these raw lists of publications and web sites contain no relevant analysis.[105] The parties did not attempt to assess the relevant importance of each participant in a particular media market. They did not discuss which outlets were owned by common corporate parents, which outlets obtained their news from a single corporate entity, or which outlets created any of their own local content. As a consequence, most of these lists are no more probative than anecdotes, and some are less.

In addition to the material submitted here, CU et al. continue to analyze the voluminous record and will supplement it with additional analysis as it becomes available.

B. THE RECORD SHOWS THAT THE RULE SHOULD BE EFFECTIVE IN A PERIOD OF LESS THAN EIGHT YEARS

The record in this proceeding displays an appalling lack of respect for the Commission's rules. Companies are clearly purchasing media outlets based on their belief that the rule will ultimately be repealed. For example, Media General now owns 6 co-owned broadcast-newspaper and at the beginning of 1995 owned only 3 newspapers and as of 1997 only 3 TV properties.[106] Media General has invested considerable capital and effort in merging the operations of its co-located newspaper and broadcast outlets. Gannett also bought KPNX and invested time and money in merging the two entities.[107]

Because the industry has demonstrated a lack of regard for the Commission's rules, the Commission ought to require any broadcast licensee to submit a renewal application within one year of its acquisition, 47 C.F.R. § 73. 3539(c), and require compliance with the

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[105] *See, e.g.,* Media General, Appendices 9-14 (Tampa/St. Petersburg; Roanoke-Lynchburg, VA; Tri-Cities, TN; Florence-Myrtle Beach, SC; Columbus GA; Panama City, FL); Hearst Corp. at Appendix A-C (Albany, NY; San Antonio, TX; San Francisco, CA); Tribune, 12-33 (New York City; Los Angeles; South Florida).
[106] Media General at 4, 6 n.11.

NBCO rule at that time. No matter what the form of the rule the FCC ultimately adopts, fairness and logic require that each licensee comply with the rule in a short amount of time, with little variance among the licensees.

Gannett's argument that "[t]he NPRM provides insufficient notice that any new criteria would be applied to existing combinations" is wrong.[108] Clearly Gannett's opposition demonstrates knowledge of the possible impending change. Moreover, this rule, at the request of the broadcast and newspaper industries, has been open to alteration and review. The same industry cannot now complain that the rule may be changed.

X. THE COMMISSION DOES NOT POSSESS A RECORD TO ABANDON SCARCITY AS A BASIS FOR POLICY OR THE APPROPRIATE CONSTITUTIONAL LEVEL OF REVIEW

The industry commenters argue that the Supreme Court's analysis in *NCCB* was predicated on an assumption that no longer exists: that spectrum scarcity is no longer present. They argue that the FCC's analysis in *Syracuse Peace Council* repudiated the scarcity rationale for media regulation. They also argue that, because the FCC rarely issues initial licenses that licenses now transfer in the marketplace, rather then by virtue of government action.[109]

The industry argues that it is time to abandon spectrum scarcity as a justification for the newspaper broadcast cross-ownership rule. It argues that the FCC is free to make such a factual finding. The FCC is not free to do so. First, under the FCC's own reasoning, the FCC must follow the Supreme Court's constitutional standard for evaluating broadcast regulation until the Court itself acts. Despite the FCC's "signal" 15 years ago, the Court has not

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[107] Gannett at 6-7.
[108] *Id*. at 7, n.8.

responded. Moreover, the FCC's own decisions since *Syracuse Peace Council* undermine the validity of that decision and directly contradict it. In addition, Congress has repeatedly sent signals pointing in the opposite direction.

A. NUMERICAL SCARCITY IS IRRELEVANT AND ALLOCATIONAL SCARCITY HAS REEMERGED

The industry's representation that spectrum scarcity no longer exists is not based in the present. The industry attempts to overwhelm the Commission with a litany of numbers, attempting to show that a vast increase in media outlets obviates the need for the Newspaper Broadcast Cross Ownership Rule.[110]

The increased number of outlets is irrelevant to the constitutional level of scrutiny directed at broadcast regulation. The Commission has soundly rejected any such contention. As the Commission concluded in *Syracuse Peace Council*, "a requirement of multiple media outlets could not have formed the basis for the framers of the First Amendment to proscribe government interference with the editorial process. At the time the First Amendment was adopted, there were only eight daily newspapers, seventy weekly newspaper, ten semi-weekly newspapers, and three tri-weekly newspapers published in America." 2 FCC Rcd at 5054.

In the present day, the Commission and NTIA are desperately looking available spectrum, but little can be found. In its 1999 Spectrum Management Policy Statement, the Commission concluded, "Over the past decade, we have experienced unparalleled growth in wireless communications. For example, capital investment in the wireless industry alone has more than quadrupled since 1993..." "The advent of ... new technologies has been accompanied by increased demand for spectrum to permit the operation and growth of new

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[109] *See, e.g.,* Media General at 67-70, n. 192, NAA 104, 106, Cox 1998 comments at 5, Cox. at 25.
[110] *See, e.g.,* Media General at 67-70, n. 192, NAA 104, 106; Cox 1998 comments at 5; Cox. at 25.

radio services. ... There is very little unencumbered spectrum available for new services. With the exception of small 'slivers' of spectrum that are not sufficient to support high volume services, the available spectrum is already occupied by existing uses. New services therefore have had to be implemented either through sharing with existing operations or through reallocation of spectrum from existing services to new services and technologies." *1999 Spectrum Policy Statement*, 14 FCC Rcd 19868, 19869 (1999).

In its NPRM issued to locate space for wireless 3G services, the Commission noted, "Over the past two decades, consumer use of mobile radio has grown from practically nothing to ubiquitous use today." 16 FCC Rcd 596 at ¶601. "Now with the exponential growth of the Internet, an additional allocation of spectrum is likely to be necessary to support anticipated demand for consumer mobile data services." The Commission recognized this need, even though new technologies will likely be introduced. Id. at ¶602.

The FCC's action in the 60-69 proceeding further underscores the FCC's recognition of scarce spectrum. The Commission is allowing other entities, desperate for spectrum, to compensate analog broadcasters to vacate their spectrum early and retarding the Commission's long-held goals of promoting a transition to digital television in order facilitate spectrum-clearing. *See Service Rules for the 746-764 and 776-794 MHz Bands*, WT Docket No. 99-168, FCC 01-258 (rel. September 17, 2001).

Additionally, in one of the more absurd claims, industry commenters cite Chairman Powell for the proposition that technological advancements may make spectrum infinite. Cox 1998 comments at 11-12. The key word here is "may." This argument will be valid only when its science fiction premise becomes reality. If this were the case, the diligent searching

for 3G spectrum and the innumerable fights between industry members about interference would be non-existent.

B. THE CONSTITUTIONAL STANDARD OF REVIEW BASED ON SCARCITY STILL STANDS

The Supreme Court's unanimous *Red Lion* decision upheld spectrum scarcity as a valid rationale for broadcast regulation. Subsequently, in *FCC v. NCCB*, the Court applied *Red Lion* to the newspaper/broadcast cross-ownership rule.

Notwithstanding these formidable precedents, a substantial number of the industry parties maintain that the Commission's 1987 *Syracuse Peace Council* decision definitively trumps the Supreme Court's actions and somehow compels the Commission to abandon ownership rules grounded in spectrum scarcity. *See, e.g.,* NAA at 105-106.

This would be an astonishing reach even were it not the case that the relevant portions of the *Syracuse Peace Council* decision were explicitly rejected by the Court of Appeals, *Syracuse Peace Council v. FCC*, 867 F.2d 654, 657 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990)(vacating portions of the agency's decision). And, indeed, it is an argument that quickly falls apart in the face of precedent. In fact, the D.C. Circuit, which decided *Syracuse Peace Council*, has consistently applied *Red Lion*. *See, e.g.*, *Tribune Co.*,133 F.3d 61, 69 (D.C. Cir. 1998).

It is now almost eighteen years since the Supreme Court indicated that it might reexamine spectrum scarcity if there were "some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required," *FCC v. League of Women Voters*, 468 U.S. 364, 376-77 n. 11 (1984).

As a threshold matter, it is critical to stress that the very "signal" to which the industry commenters point has only recently been repudiated by a majority of the FCC. If the Supreme Court of the United States were ever to reconsider a core constitutional precedent based upon the "signals" of a policymaking body, such signals must surely be strong, unambiguous and consistent. Thus, while the membership of the Commission has changed, what is important for immediate purposes is that just over one year ago, the FCC voted to repudiate the *Syracuse Peace Council* findings.

In an *Order and Request to Update Record*, 15 FCC Rcd 179972 (2000), a majority of the Commission "t[ook] this opportunity to make clear that much of the discussion in *Syracuse Peace Council*...has been repudiated." [footnote omitted]. Properly characterizing the FCC's 1987 language as "*dicta,"* the Commission majority said that:

> The fundamental error of the Commission's decision in the portion of Syracuse Peace Council that has been repudiated was its confusion of the rationale underlying the fairness doctrine with the basis for public interest regulation of the broadcast spectrum. The fairness doctrine originated at a time when there were only three major television networks, and the proliferation of television stations and the development of cable television reasonably led the Commission to reevaluate the need for the fairness doctrine. The standard of *Red Lion*, however, was not based on the absolute number of media outlets, but on the fact that the spectrum is a public resource and "there are substantially more individuals who want to broadcast than there are frequencies to allocate." As both the U.S. Supreme Court and the D.C. Circuit have explained, "[a] licensed broadcaster is 'granted the free and exclusive use of a valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations."

15 FCC Rcd at 19979-80 (footnotes and citations omitted).

Just as it is of no consequence here that the FCC's membership has changed, and that several current members of the FCC might disagree with this decision, so too is it unimportant here that the vote was taken in an Order directed at soliciting comments, and that

the solicitation was later dropped. The salient fact remains: there is no clear, unambiguous or consistent FCC policy that spectrum scarcity should be abandoned.

Over the last decade, the changing composition of the Court has consistently invoked, and relied upon, the scarcity-based trusteeship principles explicated in *Red Lion.* See, *e.g.*, *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 673 (1998) (pointing to programming mandates); *id.* at 687-88 (Ginsberg, J., dissenting) ("Congress chose a system of private broadcasters licensed and regulated by the government"); *Reno v. ACLU*, 521 U.S. 844, 868 (1997); *Turner Broadcasting Co. v. FCC*, 520 U.S. 180, 227-228 (1997)("*Turner II*") (Breyer, J. concurring); *Turner Broadcasting Co. v. FCC*, 512 U.S. 622, 637-638 (1994) ("*Turner I*") ("As a general matter, there are more would-be broadcasters than frequencies available"); *id.,* 512 US at 685 (Ginsberg, J. concurring)(noting "that a cable system, physically dependent upon the availability of space along city streets...therefore constitutes a kind of bottleneck"); *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727, 741 (1996)(plurality opinion); *Metro Broadcasting Co. v. FCC*, 497 U.S. 547, 566-67 (1990), *overruled in part by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *id.,* 497 U.S. at 615 (O'Connor, J., dissenting).

The lower courts have also continued, appropriately, to apply *Red Lion*. *See, e.g.*, *Tribune Co. v. FCC*, 133 F.3d 61, 69 (D.C. Cir 1998)("nothing in the subsequent decisions of the Court have called the constitutional validity of [the FCC's reliance on scarcity and diversity] into question"); *Action for Children's Television v. FCC*, 58 F.3d 654, 668 (D.C. Cir 1995) (*en banc*); *Marsh Media, Ltd. v. FCC*, 798 F.2d 772, 776-77 (5th Cir. 1986). In

short, as even its harshest critics acknowledge, *Red Lion* still "rules the broadcast jungle." *Tribune Co.*, 133 F.3d at 69.[111]

In the meantime, Congress has also declined to alter its treatment of over-the-air broadcasting, even as it has significantly altered the regulatory scheme to introduce competition in other wireless technologies. This has had the effect of increasing the scarcity and value of spectrum that can be used for over-the-air broadcasting. In the Children's Television Act of 1990, Pub. L. 101-437, *codified at* 47 USC §303(a), Congress invoked spectrum scarcity to impose stringent new mandates for programming directed to children and restrict commercialization during such programming.[112] In 1992, it enacted 47 USC §335, which specifically extended existing political broadcasting and other programming requirements to direct broadcast satellite licensees regulated as broadcasters, *see Time Warner Entertainment Co. v. FCC,* 97 F.3d 957, 975-976 (D.C. Cir. 1996), *reh'g. denied*, 105 F.3d 723 (1997).

Of greatest immediate significance, in 1996, in §201(a)(1) of the 1996 Telecommunications Act, Congress provided for a transition to digital television technology, using newly

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[111] The industry tries to challenge the First Amendment status of broadcasting in other unsuccessful ways as well. Media General and Comments of the Comments of the National Association of Broadcasters (NAB) cite *Buckley v. Valeo* for the proposition that the Commission may not "restrict the speech of some elements… in order to enhance the relative voice of others." *Buckley v. Valeo*, 424 U.S. 1, 48-49, 96 S.Ct. 612, 649 (1976). NAB at 27, Media General at 73. These commenters cannot learn the lessons of the past. The *Buckley* argument was rejected in *NCCB*.

> As Buckley … recognized, …" 'the broadcast media pose unique and special problems not present in the traditional free speech case.' " …. Thus efforts to " 'enhanc[e] the volume and quality of coverage' of public issues" through regulation of broadcasting may be permissible where similar efforts to regulate the print media would not be.

F. C. C. v. National Citizens Committee for Broadcasting, 436 U.S. 775, 799-800, 98 S.Ct. 2096, 2114 (1978) (citations omitted). The *NCCB* Court clearly recognized, as did Buckley, the appropriate and differential treatment of broadcasting, when compared with regulations such as those struck down in *Miami v. Tornillo*.

[112]For example, with specific reference to *Red Lion*, the House Committee said that "The opportunity to 'speak' over a broadcast station inherently is not available to all. As a result, broadcast licensees have been licensed as public trustees.... A fundamental part of that duty is the obligation to serve children, who constitute a unique segment of the television audience." H.R. Rep. No. 101-385, 101st Cong., 1st Sess. 8 (1990).

available spectrum,[113] but directed that the FCC "should limit the initial eligibility for such licenses to" incumbent television licensees. Section 204(a) specifically reenacted the spectrum-scarcity-grounded public interest standard as the basis on which broadcast license renewals are to be granted, although licensees are now afforded greater latitude with respect to minor violations that might have previously interfered with renewal. *Id.*, amending 47 USC §309(k). The 1996 Act also eliminated the right for competing applicants to challenge license renewals, and otherwise provided significant additional assurances that incumbent licensees will not be forced to surrender such spectrum as they control.

Congress once again reinforced the physical scarcity of spectrum in 2000. Congress rejected the FCC's careful measures to increase the availability of spectrum for radio broadcast use by adopting the Radio Broadcasting Preservation Act. Pub. L. No. 106-553, 114 Stat. 2762 (2000). The RBPA required the FCC to adopt overly conservative technical interference protections that reduce the likelihood that an applicant for a low power radio license will be able to receive one.

C. THE INITIAL ALLOCATION OF LICENSE BY THE GOVERNMENT TAINTS THE SUBSEQUENT TRANSFER OF LICENSES IN THE MARKET

Industry commenters argue that, even if spectrum was scarce at one time, or was initially assigned by government decision-making, that spectrum now is distributed through the marketplace. Without government intervention in distribution, they argue, spectrum should be treated like any other good. *See, e.g.,* Media General at 71, Cox 1998 comments at 7, 16-17.

[113] "Rewarding broadcasters for building the new service, the law permits them...to add more spectrum on to their existing licensed spectrum...Mostly, it is taken away from other small broadcasters, most of whom held their licenses on a second-class or temporary basis." Aufderheide, Communications Policy and the Public Interest 69 (Guilford, 1999).

The industry cannot simply sweep away the government's role in licensing. The government's initial allocation affects the ultimate distribution of the good. Law and economics literature shows that a market, while in theory, smoothly allocates goods to the party with the greatest financial ability to pay.[114] However, even law and economic scholarship recognizes that transaction costs impede that theoretical ideal. Because transactions require resources, goods do not move smoothly to their optimal location. The initial assignment of goods matters.[115]

This analysis was presaged by the Supreme Court explained in *Red Lion*:

> [T]he fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government.

Red Lion, 395 U.S. at 400.

Additionally, the FCC continues to play a role in license transfer, as evidenced by the rules at issue here. All license transfers must be reviewed by the FCC, and some are blocked. Current decisions about private transactions are governed by the FCC's rules.

D. THE RULE DOES NOT UNFAIRLY SINGLE OUT NEWSPAPERS

Several industry commenters argue that the NBCO violates equal protection standards. They argue that the NBCO singles out newspapers for a unique burden. *See, e.g,* NAA at

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[114] CU/CFA believe that the market is not an appropriate manner in which to allocate the right to speak, no more than it would be appropriate to impose a poll tax. There is no reason to believe that the disposition of broadcast properties in the market increases the benefits of those properties to the public. Viewership levels alone are not an appropriate measure for assigning value to speech.

[115] *See, generally,* Guido Calabresi, *Transaction Costs, Resource Allocation and Liability Rules--A Comment*, 11 J.L. & Econ. 67, 167 (1968); C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 J. Phil. &

101, Cox at 9-10, Tribune at 65-66, Media General at 37. Ironically, these commenters base some of their conclusions on a holding to the contrary in *NCCB*, which upheld the NBCO. The Supreme Court stated, in *NCCB*, "the regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications … owners of radio stations, television stations, and newspapers alike are now restricted in their ability to acquire licenses for co-located broadcast stations." *NCCB v. FCC,* 436 U.S. 775, 801 (1978). Major media owners are still subject to a significant number of ownership limitations based on their local station ownership. While these limitations may have been altered, and the NBCO may well also be altered as a result of the proceeding, nothing in the equal protection guarantee requires the type of precision the industry seems to advocate. Certainly well reasoned orders explaining appropriate treatment are required. But the equal protection guarantee does not dictate that if a television station owner may own another local television station, and a radio station owner may own seven other local radio stations, that a television station owner must be allowed to own a local newspaper. Moreover, some differential treatment is clearly acceptable; nothing requires the FCC to address every aspect of every problem entirely. In fact, as the FCC has indicated before, it may be because of the loosened strictures of the other media ownership rules that the NBCO is rendered more necessary.

E. CONCLUSION

Industry arguments shifting the burden of proof under the APA and section 202(h) are without merit. The rule does not violate equal protection. Spectrum scarcity remains the binding precedent for the constitutional treatment of broadcasting, and events of the last ten

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Pub. Aff. 3 (1975); Daniel A. Farber, *Parody Lost/Pragmatism Regained*, 83 Va. L. Rev. 397 (1997); Robert C. Ellickson, *The Case for Coase and Against "Coaseanism,"* 99 Yale L.J. 611, 612-613 (1989).

years have increased scarcity, not decreased it. And the government's role in allocating broadcast licenses remains relevant to this day.

Regardless of whether there are more outlets available today, the Commission must ask whether those outlets represent diverse and antagonistic sources of information or are available for the purposes of promoting civic discourse. Independent voices are what matters in civic discourse. The huge increase in concentration and ownership of multiple outlets across diverse media undercuts claims that diversity has increased. One-to-one telecommunications services and non-informational commercial activities, which are consuming vast quantities of that spectrum, do not provide the same function for civic discourse as the one-to-many communications of mass media. If that were the case, the Supreme Court would have noted that telephone service was available to over 90 percent of the households in 1968 and declared that spectrum scarcity was no longer an issue in deciding *Red Lion.*

Taking this view, the Commission must conclude that scarcity remains a central consideration in discharging it obligation to promote the widest possible dissemination of information from diverse and antagonistic sources. We turn next to an assessment of the concentration of media markets that demonstrates that this is a critical problem and that lifting the cross-ownership ban would make it much worse.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)	
Cross-Ownership of Broadcast Stations and newspaper	)	MM Docket No. 01-235
Newspaper/Radio Cross-Ownership Waiver Policy	)	MM Docket No. 96-197

STATEMENT OF HENRY GELLER

ON NEWSPAPER-TV CROSS-OWNERSHIP

This statement is based on my long experience in the communications field. I was general counsel of the FCC (1964-1970) and the Assistant Secretary of Commerce for Communications and Information in the Carter Administration. I was head of Duke University's Washington Center for Public Policy Research, focusing largely on telecom analysis, in the eighties decade, and a senior communications fellow at the Markle Foundation in the nineties decade. All my filing activities, including this one, have been on a pro bono basis.

I strongly support the existing rule barring cross-ownership of the daily newspaper and TV stations in the same area. I was general counsel in March 1970 when the rule was proposed, and urged the issuance of the Notice of Proposed Rulemaking (22 FCC2d at 339). As stated by then Chairman Dean Burch, the 'guts of the matter" is that "the evidence shows

that the very large majority of people get their news information from these two limited sources [VHF TV stations and daily newspapers]." See 22 FCC2d at 350; see also id. at 344-45, citing surveys by Roper Research Associates and others (e.g., Roper: 59% stated that they depend on TV as their source of news, and 51% cited newspapers as a primary news source). As the Supreme Court stated in the seminal 1978 NCCB case, 434 U.S. at 783-84, the Commission relied upon "studies showing the dominant role of television stations and daily newspapers as sources of local news and other information" [22 FCC2d at 346].

I would make two points: (1) The policy basis of the rule is still strong today because it is based on the First Amendment, specifically, the Associated Press principle, which is supported by both the Supreme Court and the Congress; and (2) pragmatically viewed, there has been no change that would warrant abandoning the rule.

1. The Commission cannot validly overrule the Associated Press basis of the rule.

This point requires little discussion. The First Amendment is the crown jewel of the Bill of Rights. The Supreme Court has wisely stated that the " Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the people." Associated Press v. United States, 326 U.S. 1, 20 (1944). The Supreme Court stated (436 U.S. at 796) in the 1978 NCCB case that "the 'public interest' standard [of the Communications Act] necessarily invites reference to First Amendment principles [cited case omitted] and, in particular, to the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources," Associated Press..."; that ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation.

Congress has several times relied upon Associated Press as very important to the public interest standard in fashioning communications policy (see, e.g., the legislative history of Section 612 (the cable leased commercial access provision) and the requirement that diversification of mass media be furthered in the lottery process to be used for low power TV stations).

In view of this background, the Commission cannot hold the Associated Press principle is invalid.

2. Pragmatically viewed, there has been no change in circumstances warranting abandonment of the rule.

The "guts of the matter" here thus involves whether there have been changes warranting abandonment of the rule. Proponents of abolition cite the explosion of new media -- cable, DBS, the increase in the number of TV stations, the advent of digital TV, the Internet, etc. Developments may occur in digital TV or the Internet or some unforeseen way that will markedly affect this issue in the future. My point here is that as to local issues, there is no present or near-term development that, pragmatically viewed, makes any difference.

Take any "hot" local issue -- one involving, say, the D.C. Mayor or D.C. school board. Where would people have received information or views concerning that issue in 1975? The very great majority would have gotten news and views on the issue from the daily D.C. newspapers (the Washington Post and Washington Times, if it existed then) and the four VHF stations, Channels 4,5, 7 and 9, with extensive local newscasts.

If the issue arose today, what would be different? The scores or hundreds of national cable and DBS channels would not help (one cable outlet, NewsChannel 8, does present local news, but it is owned by Channel 7 and in any event has a miniscule audience rating compared to those of the four over-the-air VHF channels; similarly, the PEG channels, while

local, have negligible audience penetration). There are some new TV UHF channels like 20 or 50 but they do little, if any, local news or public affairs programming. Digital TV or digital multicasting is nowhere, and that will be the case for years to come. Reliance by people on the Internet for discussion of the issue would be close to nil in audience penetration terms. People would very largely get news or views about the local issue concerning the D.C. mayor or school board from the same sources as in 1975 -- the two local papers, the Post and the Times (Alexandria, Montgomery County, etc., papers would not be relied upon or looked to for coverage of the D.C. issue), and the four powerful VHF stations, with their extensive local news programming. The Commission must take into account the pragmatics of the situation -- what media or signals address local issues and even then the penetration or audience ratings of the media outlets as to local issues.

When that is done, it will, I submit, come to the same conclusion as Chairman Burch did in 1970 -- that these two powerful media, the daily newspaper and the VHF stations with extensive newscasts, dominate the local informational scene and therefore should be in different ownership hands so as to diversify the sources of information coming to the people on local news and views.

In short, it is arbitrary if the Commission simply relies upon an explosion of new media, without looking to see if the media in question actually address local issues and if so, whether their reach and audience penetration is of such significance as to challenge the dominance of the above noted two forces. If analysis establishes as I strongly urge here the continued dominance of the two forces, Commission action to abolish the rule is not only arbitrary but a betrayal of a fundamental First Amendment concept, the Associated Press principle. Madison is quoted as saying that a democracy without an informed electorate is a

prelude to either a farce or a tragedy. Since the Associated Press principle is so fundamentally involved with the First Amendment and an informed electorate, the Commission clearly should act with great care and careful analysis before sloughing aside the principle's application to the present situation.

Finally, I point out that newspapers can of course own TV stations -- just not in the same area where they would be co-located. The Washington Post was a "good citizen" when, even though grandfathered, it voluntarily swapped Channel 9 in Washington for Channel 4 in Detroit (owned by a different newspaper).

Conclusion

There is an expression current today: "Do the math." Chairman Burch did the math and soundly concluded that this matter (co-located common ownership of daily newspapers and the powerful VHF stations) is the big issue for the application of the Associated Press principle to local news information, and that the two dominant forces should be in separate ownership hands. The Commission should do the math honestly and pragmatically in the present situation, and, I submit, reach the same conclusion. I certainly hope and expect that the situation will change at some future time, perhaps by the end of the decade. But hope of future developments cannot be the basis of present abolition action.

Before the
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In the matter of	)	
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STATEMENT OF LEWIS A. FRIEDLAND

THE PROBABLE EFFECT OF NEWSPAPER-BROADCAST CROSSOWNERSHIP ON THE LOCAL NEWS ENVIRONMENT

My name is Lewis A. Friedland. I am the Director of the Center for Communication and Democracy at the University of Wisconsin–Madison, where I am an Associate Professor in the School of Journalism and Mass Communication. I have conducted research on the communication industries for more than 20 years, and have also been a local television news executive producer. For the past seven years I have conducted research on civic innovation in the U.S., with particular attention to the relation between local democratic life, civic innovation, and local news. This work is summarized in *Civic Innovation in America* (2001) co-authored with **Error! Bookmark not defined.**.

One of the most fundamental principles of the role of news in a democracy is that diverse sources of news are essential to a robust public and civic life. There is little disagreement with this proposition regardless of political orientation or philosophy. The relevant question is: under what conditions is source diversity likely to flourish. Proponents of a market-driven approach to diversity argue that the most important unit of analysis is the number of technological outlets for news and information: the sheer number of cable, satellite, digital television, and Internet channels and sites, along with traditional newspapers and broadcast stations.

But news sources are not fungible. To discuss diversity, we need to agree on the relevant level of news. News about the city council or local schools or state welfare policy is not interchangeable with national news about economic or foreign policy. For sources to be considered both diverse and democratically useful, they must be diverse at the level that citizens themselves could act on them politically should they so choose. The question, then, is not, "are there a multiplicity of outlets of news and information" but "are there a multiplicity of outlets that correspond to the actual levels of governance, decision-making, and problem-solving that citizens need and use?"

In a federal system, citizens require many different forms of information to act politically: the local news of neighborhood, town, and community; regional news concerning counties and metropolitan issues (e.g. the economy and transportation); state news; news concerning the federal government's local impact and the actions of local federal representatives; and finally national and international news. Of all these types of news, only the last two can even plausibly be regularly provided by non-local sources. The relevant unit for understanding diversity, then, is the news and information environment. Communication

environments are nested in each other like Russian dolls: local within state and region, state and region within national. If we want to know whether there is robust source diversity at the local level we have to examine the local level.

The two primary sources of local news are newspapers and television. Of the two, newspapers provide substantially more local news every day than television stations. The local "news hole," the total amount of news, of even a moderately sized local newspaper is many times greater than the combined daily output of all television stations in the local news market. Further, most local television stations still rely heavily on the local newspaper to set the daily news agenda.

The lifting of the caps on television station ownership in 1984 began a long downward cycle in local television news quality. The concentration of group ownership has put steadily increasing pressure on local television news operations to become profit centers. This has meant two things. First the number of overall hours of local television news programming has substantially increased with the development of morning, mid-day, and early evening newscasts. Second, the number of journalists hired to fill this increasing news hole has not remotely risen in proportion to new programming.

In the television broadcast industry itself it is common knowledge that the quickest way to raise station profits is to increase the output of locally produced news (and attendant local advertising inventory) *without* hiring a proportional number of additional reporters and producers. The effect is obvious to even the casual local news viewer: more live shots on the same local story to take up air time (without additional reporting); more syndicated news features that appear to be locally originated; less original reporting on community and government issues.

This is substantiated by the best research on local television news quality that we have right now, the annual surveys of the Project for Excellence in Journalism. A survey of local news directors reports that while half of all stations experienced either budget cuts or layoffs in 2001, two-thirds *added* broadcast hours, and 57% "had to produce the same amount of news, or more news, despite layoffs, budget freezes or budget cuts."

What is the effect of this profit-squeeze on local coverage? The project also surveyed local news of 43 stations in 14 cities (the most extensive content analysis of local U.S. television news that exists). According to the report, one in four stories is about crime, law or the courts. Less than one percent of all stories could be called investigative. And there are as many stories (8 %) about "bizarre occurrences" as there are about civic institutions. Of the more than 6,000 total stories coded, only nine were about poverty or welfare.

What about radio? The results of concentration are even more devastating. Radio has steadily declined as a source of local news with the rise of concentrated group ownership. That the amount of local commercial radio news has declined in inverse proportion to the rise in group ownership is indisputable. No serious argument could be mounted that the rise of group ownership has had a salutary effect on the quantity of local news (much less its quality). One example from Madison, Wisconsin should suffice. There are three owners of its thirteen radio stations. Nine are owned by either Clear Channel or Entercom and are satellite programmed. Only the remaining four stations continue to provide any significant locally originated news and even this has declined.

The Internet offers no substitute for local news. Local Internet content is largely generated by databases that can be automatically formatted into information about local entertainment, yellow pages, classifieds, and so on. Where there is local news content it is

almost invariably offered by a local newspaper, or less often, television news station. For the Commission to say that the Internet provides a robust alternative to local news is untenable. Independent, self-sustaining, Internet based news operations in the United States are exceedingly rare, are virtually all in niche markets (e.g. business news), and are confined to the nations' largest cities. Solid, verified, comparative research in this area is extraordinarily thin. There is no justification for deciding that the Internet provides a satisfactory local news alternative in the absence of any evidence.

If the Internet does not provide significant local news, if the provision of local radio news is dying, and if the provision of local television news has been consistently diluted (at best) in the past two decades, only newspapers remain as a robust source of public information in the local news environment. Further, because of the declines in local broadcast reporting discussed above, they are the foundation on which all other local news provision rests. Newspapers consistently provide the most local news coverage with greater depth than any other source. But even here there are worrisome trends directly linked to the rise of publicly traded newspaper corporations within the newspaper industry, the concentration of ownership, and the linking of newspapers to the national stock market.

The most extensive recent study of this trend is the book T*aking Stock: Journalism and the Publicly Traded Newspaper Company* (2001) which examined the practices of 17 of the largest publicly held newspaper companies. Its authors (including a former editor of the *Des Moines Register)* concluded that "News has become secondary, even incidental, to markets and revenues and margins and advertisers and consumer preferences." They further found that market-driven newspapers were moving toward reduced accuracy, editorial independence, and the kind of dilution of the ratio of news workers to product parallel to that

described for broadcasting above. In short, the relevant market for local newspapers is no longer primarily local citizens, but the stock market.

We have established that the local news environment is the relevant unit of analysis for understanding the potential effects on concentration on local civic and public democratic life. We have also shown that the mainstays of local news remain local television and newspapers, and, further, that robust alternatives do not exist. Local news is not fungible: it must be produced and consumed locally. Yet we have seen that in both the local broadcast and newspaper industries there is a long-run tendency toward declining news production and reporting, and that this effect is directly linked to the concentration of ownership.

But does this decline really have any tangible effects on local source diversity? There are several studies that provide evidence that it does. My research on civic innovation has investigated the relationship between citizens' knowledge and action and newspaper overage of civic and public issues in eight cities over six years. I found that newspapers that practiced public or civic journalism, characterized in part by greater investment in local newsgathering and coverage, were more likely to have stimulated a wide range of local civic and political participation across many different areas. The greater range of voices in the local media had a significant effect on local democratic life. My colleague David Kurpius of Louisiana State University has recently compared source diversity in television stations practicing civic journalism to non-civic stations and found that source diversity was substantially higher in the civic stations for women, minorities and sources unaffiliated with government. The Project for Excellence in Journalism studies have consistently shown (over four years) that citizens understand the dilution of local news coverage and do not like it.

They want more local enterprise, more and better sources, longer stories, and even more journalists hired to improve local reporting.

The current system is not providing this kind of diverse local coverage essential to the functioning of a democracy. Further, it is precisely the kind of concentration that has been unleashed by the Commission in television, and that has now spread to newspapers through market forces, that is largely responsible for this failure. To allow further linkages between these two, already independently powerful movements towards concentration would further damage already fragile environments of local news.

What would be the almost certain, immediate effect of allowing newspaper-television cross ownership? The most obvious effect would a constriction of the supply of local news and a concomitant restriction in the supply of local news sources. The Commission's own stated preference for markets makes this evident. If a business can supply the same amount of output by cutting its labor costs, it certainly will, in the absence of any countervailing pressures. The only such pressures that exist are the regulations restricting cross ownership. Therefore, the constriction of the flow of news in the local environment is a foregone conclusion of the proposed Commission action. The only question is how much, and with what effect on local democratic life?

Regardless of whether the Commission accepts this proposition, surely it has an obligation to investigate the real effects of further concentration on local news that newspaper-broadcast crossownership would bring . The studies that we have discussed show clear long-term damage to the local news environment, and clear benefits to the public when that environment is flourishing. This kind of community social capital is a scarce resource. Once it is destroyed, it cannot be easily replenished. At minimum, the Commission has a

public obligation to conduct a serious investigation of the effects of further concentration on the local news environment before it acts.

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STATEMENT OF
ROBERT W. MCCHESNEY
MARK CRISPIN MILLER

THE STEALTH ATTACK ON THE FREEDOM OF THE PRESS

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We have read the various reports and filings before the Federal Communication Commission concerning the pros and cons of relaxing or eliminating the remaining restrictions on media ownership. We do not seek to provide additional empirical data to support one or the other position; to the contrary we wish to make a few broad points on the overall significance of these rules, drawn from our combined four decades as media scholars, authors, and journalists.

First, the notion that cable and broadcasting are naturally "free market" enterprises, in which the government may or may not intervene, is unfounded. The fact that these are commercial enterprises at all is determined, in the end, by public policy. These markets could not exist without government licensing of monopoly rights to spectrum or cable franchises. When the government allocates these privileges, it does not set the terms of the competition, so much as it selects the winners of the competition. The issue is not whether the government will play a role, but on whose behalf the government will act. That is much of what policy debates seek to determine.

Second, for communication policy to be most effective, it requires as much informed public participation as possible. If hearings on important media ownership regulations are primarily the domain of self-interested commercial parties, with marginal participation otherwise, the outcome almost certainly will serve the needs first and foremost of the self-interested parties that dominate the hearings. As the old saying goes, "if you're not at the table, you're not part of the deal." In view of the importance of these regulations, it is imperative that the FCC and Congress assure that the broad general public has some opportunity to participate and offer input. It is their right and obligation to do so. The FCC

should not embark upon major relaxation of media ownership regulations without some semblance of the informed consent of the American people.

Third, in these particular times, the FCC should be especially concerned about the corruption of its policymaking. The same large private corporations that aggressively lobby the FCC for relaxation of media ownership regulations are also among the very largest contributors to the campaigns of candidates for Congress and the presidency. (They are also among the main beneficiaries of campaign spending run amok as TV stations receive political advertising, and they lobby therefore against campaign finance reform.) To both the untrained eye and the close observer, the appearance of foul play is hard to avoid, especially when the hearings are all but unknown to a good 99 percent of Americans.

Fourth, the presumption of the FCC should not be the presumption of the large media firms that whatever makes them most profitable is, *ipso facto*, what is best for the American people. To the contrary, the presumption should be that concentrated control over media, in general, is a bad thing. This nation was founded on the idea the centralized control over the press was incompatible with democracy, and it was mandatory for democracy to have a press system where people could have a chance not only to pick from what others say, but to speak for themselves.

Fifth, to put this another way, unless there is overwhelming evidence that permitting media firms to own more media than they are presently permitted to own will improve the caliber of our media system dramatically for the vast majority of Americans, the operating principle should be to maintain the regulatory status quo, or even consider tightening media ownership regulations. Merely proving that increased concentration is not an immediate threat to the Republic does not justify relaxation of the ownership regulations. The historical record

shows that we cannot always anticipate what the effects will be, so caution is well advised. Just like getting toothpaste back in the tube once it is out is much harder than keeping it in the first place, it is very difficult to return to ownership regulations once they are lifted. The media lobbies are far too powerful.

Sixth, one need merely look at radio broadcasting to get a very clear sense of what is likely to happen if media ownership regulations are relaxed. Radio broadcasting was significantly deregulated in the 1996 Telecommunications Act, such that an individual firm could own as many stations as it wished (previously the national cap had been 28) shows this process clearly. In the past few years radio stations have been gobbled up by a handful of colossal firms, like Clear Channel and Viacom, that own hundreds of stations and up to eight in each of the cities where they operate. These radio behemoths use their market power to increase standardized fare, lower the amount of more costly local programming, and jack up the amount of advertisements and overall commercialism. Small stations cannot compete so they sell out, and listeners everywhere pay the price. It is nirvana for Wall Street and top-dollar lobbyists inside the beltway, and misery on Main Street and everywhere else.

Seventh, the claims of the media giants should be taken with a giant grain of salt. All their arguments are merely fig leaves to hide their naked self-interest, and their hired guns will produce any argument they can think of to satisfy their lust for power and profit. The media giants claim that deregulation will spur competition, lower prices, and better service. Were there any truth to that proposition, these corporations and their lobbyists would not be pushing so hard for it. The truth is that this deregulation simply permits these firms to get so much larger that they have less fear of direct competition and more ability to hyper-commercialize their content to extract greater profit. This truth is well known in the business

community, where the sort of drivel these firms provide the FCC to justify media ownership deregulation is dismissed categorically. “In every corner of the market,” one analyst noted concerning the effects of a relaxation of media ownership guidelines, “the big will get bigger and broader, thereby changing the underlying economics.”

Eighth, the media giants also claim that the emergence of the Internet makes concerns about media concentration moot. After all, what does it matter if a few companies have massive empires when there are millions of websites competing for our attention, and when the cost of launching a website is nominal. The problem with this argument is that the market-driven Internet has not spawned a new generation of commercially viable media content providers. Capitalism trumps technology. It is now clear that if we wish for the Internet to provide a well-funded alternative to corporate media fare, it will require explicit policies to encourage that development. And it is also clear that if our media firms can get even larger than they already are, they will be better positioned to maintain their dominance in the digital era, to snuff out any potential challenger while it is still a digital embryo.

Ninth, there are some, even among those who are critical of the U.S. media system, who believe concerns about media concentration are overblown. After all, they say, media was not any better a generation or two ago when there was greater competition. Or, along these lines, the type of output of the romanticized small commercial media is often worse than that provided by the huge media giants. These comments are beside the point. It is true that market concentration is not the only factor that determines press conduct. Even more competitive markets have flaws as they are commercially driven. That is why we need to develop a significant range of independent, nonprofit and noncommercial media. And in some instances concentrated ownership is not an especially important factor in explaining media

performance. But in nearly every instance where concentrated ownership has a clear effect – as in radio broadcasting – the effect is almost always negative.

Tenth, the proponents of media ownership deregulation do make two valid points: First, the emergence of digital technologies, which undermine the distinctions between media, are making traditional regulations obsolete. Second, it is not fair that some media companies and industries cannot compete on equal terms with firms that have the good fortune of being in less regulated media sectors. The solution to this problem is not to abandon media ownership regulations, but to revise them to take into consideration the new technologies and then to generate regulations that apply across all media and that serve the desired values. Such ownership regulations can never be generated in forums currently provided by the FCC, where high-roller lobbyists make their case before FCC members with virtually non-existent public attention or debate.

To conclude, the FCC should not change media ownership regulations to permit greater media concentration at present. Any hearings to alter these regulations should aggressively move outside the beltway and establish numerous public forums for broad-based citizen participation. When in doubt, there should be a very substantial bias toward multiplicity in media rather than concentration. It is a core liberal and democratic value.

Before the
Federal Communications Commission
Washington, DC 20554

In the matter of	)	
Cross-Ownership of Broadcast Stations and newspaper	)	MM Docket No. 01-235
Newspaper/Radio Cross-Ownership Waiver Policy	)	MM Docket No. 96-197

STATEMENT OF STEPHEN KIMBER

My name is Stephen Kimber. I am an Associate Professor and Director of the School of Journalism at the University of King's College in Halifax, Canada. I've taught newspaper, magazine and online journalism at the university since 1982. During that time, I have also continued to practice journalism professionally. I am the author of four nonfiction books, numerous national magazine articles and television documentaries, since 1985, a weekly general interest column for the Halifax *Daily News.*

I am writing to you today in connection with my own experiences as a newspaper columnist and in support of maintaining the FCC's rule barring cross-ownership of the daily newspaper and TV stations in the same area.

During my 15 years as a columnist with the *Daily News*, the newspaper has changed owners five times, moving in the process from a newspaper owned and operated by its journalist/entrepreneur founder to a publication that is now part of Canada's largest media empire, CanWest Global Communications Corp.

In addition to the *Daily News,* CanWest Global owns daily newspapers in every major Canadian city except Toronto and Winnipeg. In nine of those cities, including Halifax, CanWest's Global Television Network also owns a local television outlet. To give you a clearer picture of the extent of CanWest's media dominance in Canada, it may be worth briefly sketching its overall Canadian[116] holdings which, in addition to the 14 metropolitan dailies and nine television outlets mentioned above, also includes the *National Post,* one of two national newspapers published in Canada, four other television stations, 126 smaller daily and weekly newspapers, six digital cable television channels, a television and film production company and canada.com, the third most popular Internet destination in Canada. CanWest's television network reaches 94 per cent of Canadian households.

Before CanWest acquired the *Daily News* in 2000*,* I was free to write about virtually any subject — from Middle East politics to Canadian economic issues to media ethics to taking my son to his first hockey game. Because of my other role as a journalism professor, I would occasionally even write – and the newspaper would publish — columns critical of editorial decisions or policies of the newspaper's owners or managers. There were no taboos. My column would sometimes be edited for space, or style, or for legal concerns, of course, but never to conform to a pre-determined corporate point of view.

That changed after CanWest assumed ownership of the newspaper. I began to notice that references in columns I wrote concerning the Arab-Israeli conflict that did not match the owners' unqualified support of the government of Israel were eliminated. And I was told not to write critically about the increasingly cozy relationship between the CanWest-owned

[116] CanWest also owns broadcast outlets in Australia, New Zealand, Northern Ireland and the Republic of Ireland.

National Post and Global Television or, in fact, to write critically at all about any CanWest company, policy or operation.

In the fall of 2001, CanWest Global announced plans to require all of its metro daily papers to publish three weekly national editorials prepared by the company's head office. The papers were not allowed to criticize or take positions different from the national editorials, regardless of local conditions or interests. While it was not explicitly stated, it quickly became clear this prohibition also applied to signed columns such as the one I wrote.

After careful consideration, I decided I had to write a column about what I considered an unreasonable attempt to limit freedom of discussion and suppress debate. In part, I wrote in the column, which was intended for publication January 4, 2002:

> CanWest's owners, Winnipeg's Asper family which made its fortune in the television business, appear to consider their newspapers not only as profit centres and promotional vehicles for their television network but also as private, personal pulpits from which to express their views. The Aspers support the federal Liberal party. They're pro-Israel. They think rich people like themselves deserve tax breaks. They support privatizing health care delivery. And they believe their newspapers, from Victoria, BC, to St. John's, NF, should agree with them.

My editor at the *Daily News* referred the column to CanWest's head office in Winnipeg, which ordered it spiked. I resigned on January 3, 2002.

Fortunately, this story was significant enough to get national and international coverage. Given that CanWest's interference in local editorial decision-making had already become a controversial issue in Canada — journalists at the CanWest-owned Montreal *Gazette* had briefly withdrawn their bylines in December 2001 to protest the national editorial policy — it is perhaps not surprising that my resignation became a news story. Halifax's other daily newspaper, the *Chronicle-Herald,* featured the story on its front page. Both CTV, a private Canadian network, and the CBC, the public broadcaster, ran stories about the dispute

on their local and national evening newscasts. *The Globe and Mail* and the few other daily newspapers across Canada not owned by CanWest also carried the story. So too did the *Washington Post*, *The Guardian Weekly* and Radio New Zealand. Not a word appeared in the *Daily News* or on the local CanWest-owned Global TV outlet. *The National Post* didn't cover it. Neither, to my knowledge, did any other Global TV outlet or CanWest newspaper.

I don't mean to be disingenuous. While I would certainly acknowledge that there was an element of self-interest and competitive spirit in the play the other media, especially the local outlets, gave this story, I think it is also clear that the Global TV station in Halifax would have also considered this story newsworthy if it had not involved a newspaper its owners also owned.

My situation is far from unique. Since I resigned, at least five other columnists across the country have resigned or been fired after CanWest refused to carry their columns critical of corporate editorial policies, the governing Liberal party (CanWest's controlling shareholder is a strong supporter of the prime minister and his party), or Israel.

The only reference to all of this from CanWest Global-owned newspapers or TV stations — with the exception of letters-to-the-editor columns — was a spirited attack on CanWest's critics in a lengthy column written by CanWest's Managing Editor, which head office required all of its metro dailies to run verbatim.

These are but a few examples of the threats to freedom of expression that can result when one company owns both a newspaper and television station in the same market. In this case, I was in the fortunate position that I did not depend on CanWest for the majority of my income so I was able to resign and do it in a public way. That, coupled with other related events occurring simultaneously, was enough to prompt other media to cover the controversy

and inform the public. However, in most instances such coverage would be impossible to obtain and the public would not be made aware of this kind of heavy-handed owner interference in journalism.

To make matters worse, we have begun to see indications in Canada that cross ownership is affecting not only the presentation of diverse opinions but also news coverage as well. In Halifax, the editor of the *Daily News* and the News Director of the Global TV station discuss which local stories each will cover and how they will be covered. Global uses *Daily News* reporters on its newscasts to provide coverage of events its own reporters no longer attend, meaning the variety of perspectives its readers and viewers get is reduced. My understanding is that this is now common practice in cities where CanWest owns newspaper and television interests, including in Vancouver, Canada's third largest city, where CanWest dominates the market, owning both local daily newspapers and two television stations.

Largely because of our recent experiences with the deleterious impact of increasing media concentration and cross ownership, many Canadians are beginning to ask whether we need regulations in this country to prevent companies from owning competing media in the same community. It would be ironic and unfortunate if the F.C.C. chose this moment to abandon a rule that has helped to encourage the publication and broadcast of a variety of diverse and competing views on local issues in American cities.